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No. 09-_____

In The
Supreme Court of the United States

MACERICH MANAGEMENT COMPANY and
MACERICH PROPERTY MANAGEMENT COMPANY,

Petitioners,

v.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA LOCAL 586;
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA LOCAL 505; and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that states may require private shopping malls to grant third parties access to the malls' common areas for purposes of engaging in certain expressive activity. The third-party activity at issue in *PruneYard* – solicitation of signatures on a political petition – was in support of a cause that the mall did not oppose and that did not conflict with the mall's commercial interests. The present case raises the following questions, unanswered by *PruneYard*:

1. Does a state law requirement that a private shopping mall provide third parties access to the mall for expressive activity violate the shopping mall's property rights under the Fifth Amendment where the activity – here, urging patrons to boycott the mall and its stores – conflicts with the mall's commercial interests?

2. Does a state law requirement that a private shopping mall provide third parties access to the mall for expressive activity violate the shopping mall's First Amendment free speech rights where the expressive activity is in support of a cause opposed by the mall?

RULE 29.6 STATEMENT

The parties to the proceedings are identified in the caption of the case. In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, petitioners Macerich Management Company, a California corporation, and Macerich Property Management Company, LLC, a Delaware limited liability company, state they are both fully owned by The Macerich Partnership, L.P., a Delaware limited partnership. The Macerich Company, a Maryland corporation, is a publicly traded company and is the one percent general partner and eighty-seven percent limited partner of The Macerich Partnership, L.P. The other limited partners of The Macerich Partnership, L.P., are individuals.

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PETITION FOR A WRIT OF CERTIORARI

Macerich Management Company and Macerich Property Management Company (collectively, MPM) respectfully petition this Court for a writ of certiorari to review the published decision of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on June 2, 2009, in which the court affirmed in part an order by the National Labor Relations Board (NLRB or the Board) and in which two judges, over a dissenting opinion, reversed the remaining portion of the NLRB order. The Ninth Circuit denied rehearing on May 26, 2009, with one judge dissenting.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-54, is reported at 540 F.3d 957. The NLRB order, Pet. App. 55-134, which was the subject of the enforcement action in the court of appeals under 29 U.S.C. § 160(e) and (f), is reported at 345 NLRB 514. The underlying decision of the Administrative Law Judge (ALJ), Pet. App. 85-134, is incorporated in the Board's order.

JURISDICTION

The court of appeals' opinion was filed, as corrected, on October 28, 2008. A timely petition for rehearing and rehearing en banc was denied on May

26, 2009, Pet. App. 139-141, and a final judgment was entered on June 2, 2009, Pet. App. 142-159. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution of the United States provides in relevant part that "[t]his Constitution . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The First Amendment to the Constitution of the United States provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ." U.S. Const. amend. I.

The Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 7 of the National Labor Relations Act provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all such activities" with a limited exception not relevant here. 29 U.S.C. § 157 (2008).

Section 8(a)(1) of the National Labor Relations Act provides in relevant part that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7 of the Act]." 29 U.S.C. § 158(a)(1) (2008).

Article I, section 2 of the California Constitution provides in relevant part that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2(a).

STATEMENT OF THE CASE

A. Jurisdiction

Jurisdiction is premised upon a petition by the NLRB for enforcement of a Board order, pursuant to 29 U.S.C. § 160(e), and cross-petitions by the United Brotherhood of Carpenters and Joiners of America

Locals 586 and 505 (collectively, the Union) and MPM for review of the Board's order, pursuant to 29 U.S.C. § 160(f).

B. Summary of Proceedings

The Board order reviewed in the court of appeals addresses the validity of six rules adopted by two privately-owned shopping malls in California to regulate public use of the mall's common areas for expressive activities. The Board found that three of these rules violated federal labor law when applied to certain protest activities of the Union, while the other three rules did not. One Board member dissented from the latter finding.

On cross-petitions for review, the court of appeals held that all six of the mall rules violated federal labor law. The court held that any property rights that the malls might have are subordinated to a requirement of California law that the common areas of a shopping mall must be available for third-party expressive activities. The court did not address MPM's position that the federal constitution limits the extent to which states may interfere with private property rights. One panel member dissented from the majority's invalidation of the rules that the Board had approved. The panel, by a 2-1 vote, denied rehearing. The court denied en banc review.

C. Factual and Procedural History[1]

1. MPM's rules governing expressive activities at its malls

MPM operates shopping malls in California. As part of its operations, MPM has adopted a number of rules governing the public's use of its malls' common areas. These rules are designed to provide reasonable access to the malls' common areas for non-commercial expressive activities by members of the public while regulating conduct that MPM considers to be unduly disruptive to mall business and public safety.

The six MPM rules at issue, as numbered and labeled by the court of appeals, are as follows:

> Rule 1 (identification ban): the mall will not approve expressive activities that identify the mall owner or tenants.
>
> Rule 2 (commercial purpose rule): signs, posters, and other written materials "may not interfere with the commercial purpose" of the mall or its tenants.
>
> Rule 3 (signage ban): participants in expressive activities "may not carry or wear any signs, posters or placards."

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[1] Unless indicated otherwise, the factual history is derived from the court of appeals' opinion.

Rule 4 (application requirement): a written application must be submitted prior to participants' engaging in expressive activities.

Rule 5 (designated areas rule): expressive activities are limited to designated areas on mall property.

Rule 6 (peak traffic rule): no expressive activities are permitted during 30 days that the mall designates as "peak traffic days."

The rules state further that they do not bar any activities that are protected by state or federal labor law. Pet. App. 169. The rules, which are the same at both malls on all relevant points, are provided in full in the appendix. Pet. App. 169-89.

According to MPM, the purpose of its shopping malls is to sell goods and services. Pet. App. 278. MPM contends that its rules were designed to ensure a safe and secure environment for shoppers and to honor the expressive rights of others without unduly jeopardizing the commercial interests of mall tenants. Pet. App. 281. MPM's stated policy is to allow non-commercial expressive activity on a neutral basis – even if the subject matter is unpopular – subject to reasonable time, place, and manner rules. Pet. App. 210, 212. In the event someone disputes the application of the rules to a particular expressive activity, MPM instructs mall management to offer that person a document that describes his or her rights under this Court's holding in *PruneYard*, 447 U.S. 74. Pet. App. 237, 242-44.

2. The Union's activities promoting a boycott of the malls

From December 1999 to May 2000, the Union engaged in expressive activities at two MPM malls to protest the use of non-unionized labor in the construction of mall tenant stores. During the course of these activities, the Union distributed handbills, picketed, and encouraged a consumer boycott of the malls and certain stores within the malls.

According to Union officials, the protests, which drew up to forty-five participants, were specifically designed to discourage mall customers from buying goods and services at the malls. *See* Pet. App. 260-65. Most of the activity targeted two stores (Sears and Gottschalks), both of which were located near areas that were designated for authorized activity under MPM's Rule 5. *See* Pet. App. 189, 258. The Union refused to submit applications for the use of such areas because it viewed that requirement (i.e., Rule 4) as a violation of its rights.[2]

In response to the Union's protests, MPM enforced its expressive activity rules, thereby limiting Union activity on mall property. MPM told the protesters that their actions were disruptive to business and were not supported by duly filed applications.

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[2] An attorney for the Union purported to submit an application for expressive activity on one occasion, but did not offer a list of participants or copies of the materials that it planned to use, as required by Rule 4. *See* Pet. App. 261-67, 269-70.

The interactions between mall officials and the protesters were often contentious. One mall official testified to being afraid and several arrests were made. Pet. App. 273-75.

3. The conflicting ALJ and NLRB decisions

The Union responded to MPM's enforcement of its rules by filing a charge with the NLRB, alleging that the six rules described above constituted unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (NLRA). The ALJ found that Rule 1 (identification ban), Rule 2 (commercial purpose rule), Rule 3 (signage ban), and Rule 4 (application requirement) are content-based rules that violate California law and, thus, their use violates Section 8(a)(1). Pet. App. 119-20. The ALJ also found that Rule 5 (designated areas rule) and Rule 6 (peak traffic rule) violate Section 8(a)(1) because they bar use of sidewalks within the mall and, as such, are not valid time, place, and manner rules. Pet. App. 120-22.

The NLRB agreed with the ALJ in rejecting Rule 1 (identification ban), Rule 2 (commercial purpose rule), and Rule 4 (application requirement) as improper content-based rules. Pet. App. 61-63. The Board, however, upheld Rule 3 (signage ban), Rule 5 (designated areas rule), and Rule 6 (peak traffic rule) as valid time, place, and manner rules. Pet. App.

64-71. Member Liebman dissented as to the Board's approval of the latter three rules. Pet. App. 76-81.

4. The split Ninth Circuit decision, reversing the NLRB in part, and the NLRB's change of position on the validity of the malls' rules

On October 24, 2005, the NLRB filed a petition for enforcement of its order with the court of appeals. The Union and MPM filed cross-petitions for review. The cases were consolidated and the parties submitted briefs. On October 15, 2007, the court of appeals deferred submission until the Supreme Court of California issued its opinion in *Fashion Valley Mall, LLC v. NLRB*, which it did on December 24, 2007. 42 Cal. 4th 850, 172 P.2d 742 (2007). Pet. App. 137-38. Pursuant to a December 28, 2007 order of the court of appeals, Pet. App. 135-36, the parties filed supplemental briefs to address the impact of *Fashion Valley*.[3]

On August 25, 2008, the Ninth Circuit issued its decision: *United Brotherhood of Carpenters & Joiners of America v. NLRB*, 540 F.3d 957 (9th Cir. 2008). The court later re-issued its opinion, but only to correct an

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[3] The Union and NLRB moved to strike the part of MPM's supplemental brief contending that the application of the *Fashion Valley* holding would result in a taking in violation of the Fifth Amendment. The court of appeals did not grant the motion. The brief section is provided in the appendix at pages 164 to 168.

error in the caption. Pet. App. 51-54. The panel majority rejected all six of the mall rules as follows:

Rule 1 (identification ban): The court held that Rule 1 is content-based and thus subject to strict scrutiny. The court held that Rule 1 fails strict scrutiny because its stated purpose of "protect[ing] the 'good name' of the mall and its tenants" was not a compelling interest. Pet. App. 15-16.

Rule 2 (commercial purpose rule): The court held that Rule 2 is content-based because it "requires that the regulating authority examine the content of the written material to determine whether it complies" with the rule and that the rule fails strict scrutiny because it "is entirely motivated by hostility towards messages critical of the mall or its tenants." Pet. App. 16.

Rule 3 (signage ban): The court held that Rule 3 is content-neutral, but can only be enforced if (1) it is "justified without reference to the content," (2) it is "narrowly tailored to serve a significant interest," and (3) alternative communication channels remain. Pet. App. 20-21. The court held that the ban is not narrowly tailored to promote a significant mall interest and does not leave open ample alternative means of communication. Pet. App. 24-25.

Rule 4 (application requirement): The court held that Rule 4 was invalid, albeit only to enforce Rules 1 and 2, because it requires

"examination of a speaker's message." Pet. App. 19.

Rule 5 (designated areas rule): The Union conceded that Rule 5 is content-neutral, but the court held that its ban on mall sidewalk use is not narrowly tailored to traffic flow and fire code compliance and that the sidewalk ban and distance of designated areas from the stores does not leave open ample alternative means of communication. Pet. App. 29-31.

Rule 6 (peak traffic rule): The court held that Rule 6 is content-neutral, but that the total ban during the 30 peak shopping days is not narrowly tailored to promote pedestrian traffic flow or safety, or to minimize congestion. The court also held the rule did not provide sufficient alternative means of communication because 75 percent of mall sales occur during the peak traffic days, i.e., during the holidays. Pet. App. 32-33.

Judge Callahan dissented from the majority's holding to strike down Rule 3 (signage ban), Rule 5 (designated areas rule), and Rule 6 (peak traffic rule). Pet. App. 34-35 (Callahan, J., concurring in part, dissenting in part). She concluded that each of these rules constitutes a reasonable time, place, and manner regulation, as the NLRB had found in its order. Judge Callahan asserted that, even if free speech rights are extended to expression in private shopping malls, such malls, unlike municipalities, "have an

interest in avoiding interference with the commercial purposes of property." Pet. App. 38-39.

MPM filed a timely petition for panel rehearing and rehearing en banc. Shortly thereafter, the NLRB indicated that it would no longer support Rules 3, 5, and 6, as it had in its order and in its briefing to that point. MPM moved to intervene to continue the defense of those rules. The court granted MPM's motion. Pet. App. 141.

On May 26, 2009, the panel majority, with Judge Callahan dissenting, denied MPM's petition for panel rehearing and announced that there was insufficient support on the court for rehearing en banc. Pet. App. 139-41. The court's final judgment, which incorporated a revised NLRB order to strike down all six mall rules, was entered on June 2, 2009. Pet. App. 142-59.

REASONS FOR GRANTING THE PETITION

This case raises critical, recurring questions about the extent to which a private shopping mall may limit expressive activities of third parties in the mall's common areas, particularly where those activities clash with the mall's commercial purposes and those of its tenants. Some of these questions arise under the Fifth Amendment, which generally protects private malls against unwanted invasions of their property. The other questions arise under the First Amendment, which generally protects private mall

owners in *their* exercise of speech, including their decision to refrain from speaking or sponsoring the messages of another.

The Court recognized a narrow exception to the foregoing constitutional guarantees in *PruneYard*, 447 U.S. 74. The Court held that even though the federal constitution does not require mall owners to grant the public access to mall property to engage in expressive activities, a state may impose such a requirement. The expressive activity at issue in *PruneYard*, however, was unrelated to mall business, was in support of a cause not opposed by the mall, and was not contrary to the mall's commercial interests. Also, in *PruneYard*, the California Supreme Court had indicated that malls would be permitted to adopt reasonable regulations to protect their commercial operations.

PruneYard left open the federal constitutional issues that are squarely presented here, where state law requires a shopping mall to permit third-party expressive activity that encourages conduct – here, a boycott of the mall – that the mall opposes and that conflicts with the mall's commercial interests. *PruneYard* likewise reserved the federal constitutional issues arising where state law seriously limits the extent to which the mall may adopt reasonable time, place, and manner restrictions on expressive activity. Here, for example, the Ninth Circuit has held that state law precludes a mall from either limiting expressive activities to designated areas within the

mall or prohibiting such activities on the mall's peak traffic days.

Answers to these open questions are sorely needed, not only by the thousands of private shopping malls and mall tenants that are affected, but also by those groups and individuals seeking to engage in expressive activities at malls as well as the government agencies (the NLRB in this case) charged with protecting expressive activity while limiting the conscription of private property.

I. CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT FIFTH AMENDMENT "TAKING" QUESTIONS LEFT OPEN BY THE COURT IN *PRUNEYARD*.

A. The *PruneYard* Decision, Which Permits Physical Invasions of Shopping Malls, Has Been Rejected in Several States, But Adopted in Several Others, Reflecting a Need for Guidance by this Court on the Constitutional Limits of the Doctrine.

A physical invasion of an owner's property generally constitutes a taking under the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). The "'right to exclude'" others is "universally held to be a fundamental element of the property right" in this context. *Id.*

"[A] 'permanent physical occupation' has occurred" for taking purposes if there is a continual

right to invade, even if each instance of invasion by a person or group is temporary. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987). Private property does not lose its constitutional protection, moreover, "merely because the public is generally invited to use it for designated purposes." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972).

In *PruneYard*, the Court created a narrow exception to the well-established rule that a physical invasion of private property generally constitutes a taking. The Court upheld a state law requirement that private shopping malls allow public access for expressive activity. The activity in that case, however, was in support of a cause that was not opposed by the mall or contrary to its commercial interests. In upholding the state requirement, moreover, the Court expressly limited the scope of its holding, noting that the "sort of activity" at issue – solicitation of signatures on petitions opposing a U.N. resolution against "Zionism" – *did not "impair the value" of the mall*. 447 U.S. at 83 (emphasis added). Furthermore, the Court emphasized that the California Supreme Court had provided assurances that shopping malls may "restrict expressive activity by adopting time, place, and manner regulations that will *minimize any interference with [their] commercial functions*." *Id.* (emphasis added).

The Court readily acknowledged in *PruneYard* that requiring the owner of a shopping mall to grant members of the public access to the mall's common areas to engage in expressive activities constitutes a

taking in the literal sense, but held that requiring a mall to permit non-commercial, political activities in support of a cause that is not contrary to the mall's commercial interests does not result in a compensable taking. The Court left open the question whether a state law requirement that a mall permit non-political speech that is demonstrably contrary to the mall's commercial interests and opposed by the mall might be a taking.

After *PruneYard*, the states and lower federal courts have reached conflicting decisions about the extent to which a shopping mall must permit its property to be open to the public to promote causes that are contrary, and in some cases inimical, to the mall's commercial interests. Only this Court has the power to conclusively resolve these troublesome questions.

On one end of the post-*PruneYard* spectrum, about fifteen states have protected private shopping malls from harmful physical invasions by declining to extend any state law protection to expressive activity in malls. *See Reimers v. Super Target of Grand Forks*, 363 F. Supp. 2d 1182 (D. N.D. 2005); *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (1988); *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984); *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 260 Ga. 245, 392 S.E.2d 8 (1990); *State v. Viglielmo*, 105 Haw. 197, 95 P.3d 952 (2004); *City of W. Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002); *Woodland v. Mich. Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985); *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999); *SHAD*

Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 488 N.E.2d 1211 (1985); *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981); *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 626 N.E.2d 59 (1994); *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 11 P.3d 228 (2000); *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986); *Charleston Joint Venture v. McPherson*, 308 S.C. 145, 417 S.E.2d 544 (1992); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987).

At the other end of the spectrum, several other states (including California and New Jersey, which consist of about fifteen percent of the national population) have treated private shopping malls as virtually indistinguishable from municipalities in requiring them to host expressive activity even if contrary to the mall's commercial interests. *See Fashion Valley*, 42 Cal. 4th at 869-70, 172 P.3d at 754 (construing state law to require mall to offer access for a boycott of one of its stores because, according to state court, mall was a public forum); *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 362, 650 A.2d 757, 775 (1994) (construing state law to require mall to permit anti-war leafletting; malls' general invitation to the public constituted an invitation for the activity).[4] Puerto

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[4] The need for guidance is even more acute in light of decisions of New Jersey courts to extend the *PruneYard* holding beyond shopping malls to include private colleges and private condominium complexes. *See State v. Schmid*, 84 N.J. 535, 423

(Continued on following page)

Rico has similarly allowed mall protests based on its understanding of malls as the new town squares – at least in a case where the mall housed a public agency to which the protest was directed. *Empresas Puertorriqueñas de Desarrollo, Inc. v. Hermandad Independiente de Empleados Telefonicos*, 2000 PRSC 71 (2000).

The Ninth Circuit opinion in this case, applying California law, is the most extreme application of *PruneYard* to date, not only requiring a shopping mall to host expressive activities endorsing a boycott of the mall and its tenant stores, but also barring it from enforcing reasonable time, place, and manner rules. *See* Pet. App. 3-6, 34.

In addition to the courts in New Jersey, California, and Puerto Rico, a number of other states, including Colorado, Massachusetts, and Washington have extended protection for expressive activity in private malls in support of non-commercial, election-related activities. *See, e.g., Strahan v. Fraier*, 156 F. Supp. 2d 80 (D. Mass. 2001); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991); *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983); *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 197 (1981); *accord*

A.2d 615 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982); *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 297 N.J. Super. 404, 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996).

Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 780 P.2d 1282 (1989) (limiting *Alderwood* to petitioning context).[5]

Despite the seemingly limited nature of the last group of cases, those states have essentially adopted the rationale underlying the decisions of the New Jersey and California courts. For example, in *Alderwood*, the Supreme Court of Washington upheld the right of an environmentalist group to solicit signatures on mall property, concluding that "[t]he only offsetting consideration is the mall owners' private autonomy interests, *which are quite minimal* in the context of shopping centers." 96 Wash. 2d at 246 (emphasis added). In any event, having required shopping malls to provide access to the public for expressive activities, these states no less than California and New Jersey, also require guidance on the issue whether expressive activity on a mall's property that is contrary to the mall's commercial interests constitutes an unconstitutional taking of mall property.

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[5] Courts in Delaware, Florida, and Illinois have indicated a willingness to expand speech protection in large shopping malls, although cases have yet to present themselves. *See State v. Elliott*, 548 A.2d 28, 33 (Del. Super. Ct. 1988); *Publix Shopping Markets, Inc. v. Tallahasseans for Practical Law Enforcement*, No. 2004 CA 1817, 2005 WL 3673662, at *4 (Fla. Cir. Ct. Dec. 13, 2005); *People v. DiGuida*, 152 Ill. 2d 104, 126, 604 N.E.2d 336, 349 (1992).

Given the sweeping decisions in cases such as *Fashion Valley* and the present case, and the similarly sweeping *dicta* in decisions such as *Alderwood*, there is a compelling need for this Court to address the extent to which states may require malls to provide access to their facilities for non-political speech, contrary to the mall's commercial interests, without depriving the shopping mall of the protection against takings guaranteed by the Fifth and Fourteenth Amendments. As the Supreme Court of Ohio has observed, "[a] state may adopt greater protections for free speech on private property than the First Amendment does, *so long as* those broader protections do not conflict with the private property owner's constitutional rights under the First, Fifth and Fourteenth Amendments." *Eastwood Mall*, 68 Ohio St. 3d at 222, 626 N.E.2d at 60-61 (emphasis added). The question presented as to that Fifth Amendment limit affects numerous states, with millions of citizens and thousands of businesses involved. It is a pressing one that cries out to the Court for an answer.[6]

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[6] Certiorari was denied in *Fashion Valley Mall, LLC v. NLRB*, 129 S. Ct. 94 (2008). MPM submits that the present case offers stronger reasons for a grant of certiorari than did *Fashion Valley* because it raises multiple issues not present in *Fashion Valley*, including the proper test for determining content-neutrality and, as described below, the rejection of reasonable time, place, and manner restrictions.

B. The Ninth Circuit's Approach to the Unanswered Questions of *PruneYard* Ignores Fundamental Differences Between Public and Private Property Under the Fifth Amendment.

1. The Ninth Circuit's decision should be reviewed because it prevents a mall from barring expressive activities that are inimical to the mall's commercial interests.

As explained by the dissent in *Fashion Valley*, 42 Cal. 4th at 878, 172 P.3d at 760 (Chin, J., dissenting), private property owners should not be prevented from "controlling expressive activity on their property . . . that is *inimical* to the purpose for which the property is being used." Promoting business on private property "is not only a compelling interest, it is the property owner's primary concern; doing business is the reason the shopping center exists." *Id.* at 881, 172 P.3d at 762; *see also Union of Needletrades, Indus. & Textile Employees v. Superior Court (UNITE)*, 56 Cal. App. 4th 996, 1000, 65 Cal. Rptr. 838 (Ct. App. 1997) (upholding mall's right to review speakers' written materials to prevent interference with mall's commercial purpose; "the right to conduct expressive activities in a shopping center is not absolute"). As the Supreme Court of Wisconsin has observed, a private mall "concerns itself only with one facet of its patrons' lives – how they spend their money." *Jacobs*, 139 Wis. 2d at 523.

Justice Black captured the point in his dissent in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), where the majority had required handbilling at a private shopping center under the First Amendment. He wrote: "To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Id.* at 332-33 (Black, J., dissenting). In *Lloyd*, 407 U.S. 551, the Court abrogated its holding to the contrary, thereby vindicating Justice Black. *Id.* at 562-63, 565; *see Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) (noting abrogation of *Logan Valley*).

PruneYard distinguished *Lloyd*, but it did not go nearly so far as the Ninth Circuit opinion in this case or the California Supreme Court's 4-3 holding in *Fashion Valley*, which both sanction a physical invasion of the owner's property for the purpose of engaging in activities that are directly contrary to the owner's commercial interests. An isolated petition to the United Nations by a group of high school students that is merely marketed on mall property, as in *PruneYard*, is quite different than a concerted effort by union professionals to bring mall business to a halt.

The facts in this case demonstrate the need for an approach to takings analysis that permits courts to give meaningful consideration to a shopping mall's

commercial interests before upholding a state-sanctioned invasion of mall property. At a minimum, in applying the "compelling state interest" test to private businesses, it seems both logical and proper to replace the word "state" with the word "business" when evaluating the validity of regulations of expressive activity. *See Fashion Valley*, 42 Cal. 4th at 881, 172 P.3d at 762 (Chin, J., dissenting) (positing that, when applied to private businesses, "[t]he compelling *state* interest test would have to yield to . . . [a] 'compelling landowner interest' test"). As the Court pointed out in *PruneYard*, "the Taking Clause requires an examination of whether the restriction on private property forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 447 U.S. at 83 (internal quotation marks and alterations omitted).

Applying these general principles to this case, MPM's Rule 2, which bans signs and written materials that interfere with the "commercial purpose" of the mall, is a constitutionally-protected exercise of property rights and the Ninth Circuit's decision invalidating Rule 2 therefore improperly sanctions a taking of mall property. Likewise, the Ninth Circuit's invalidation of Rule 1, which protects against identification of the mall and its stores, similarly interferes with the mall's commercial interests and, therefore, constitutes an unconstitutional taking. To the extent that Rule 4's application process supports Rules 1 and 2, that rule should similarly be constitutionally protected.

2. The Ninth Circuit's test for determining whether a mall's rules are "content-neutral" should be reviewed because it prevents malls from "examining" expressive activities in attempting to regulate such activities.

The test applied by the Ninth Circuit to determine whether a mall's rules are "content-neutral" under California law effectively precludes mall owners from rejecting *any* expressive activities based on content, once again bringing California state law into conflict with the mall's Fifth Amendment property rights. Under the test articulated by the Ninth Circuit to determine whether a mall's rules are content-neutral, a mall may not "examine" the content of proposed expressive activities for *any* business purpose. Pet. App. 13. The Ninth Circuit applied this test to strike down Rule 1 (precluding expressive activities that identify the mall or its tenants) and Rule 2 (precluding use of written materials that interfere with the "commercial purpose" of the mall), holding that because the implementation of the rules requires the mall to examine the content of the proposed expressive activity, the rules are invalid under the "strict scrutiny" test applied to strike down state action in First Amendment cases. Pet. App. 14-17.

The Ninth Circuit's test for determining whether a mall's rules are "content-neutral" merits review by this Court. A shopping mall has a compelling interest

in *examining* speech for many legitimate purposes, including the prevention of activities designed to bring about the destruction of its business or to provoke disturbances on mall property. As explained by the dissent in *Fashion Valley*, if the speech is directly contrary to the mall's commercial interests, the mall has a valid basis for excluding the speech. 42 Cal. 4th at 880-81, 172 P.3d at 761-62; *see also UNITE*, 56 Cal. App. 4th at 1018, 65 Cal. Rptr. 2d at 838 ("wearing its hat as a center of commerce, [a mall] has the right (if not the obligation) to take steps to avoid a breach of the peace which is substantially likely to flow from [a speaker's] use" of illicit or inflammatory materials likely to provoke a disturbance on the mall's property).

Under the Ninth Circuit's test, a mall owner would be unable to engage in the following conduct, all of which is consistent with protecting the mall's commercial interests and many valid public policies:

Examining speech to determine if it is a pretext for unfair competition (e.g., advertising or other commercial promotions by third parties, appropriation of name or likeness)

Examining speech relating to a boycott to confirm that it is not illegal secondary boycott activity under federal labor law

Examining speech to determine if it is defamatory

Examining speech to determine if it violates common law privacy rights, such as public

> disclosure of private facts or presentation in a false light
>
> Examining speech to determine whether it is obscene, contains fighting words, grisly displays inappropriate for a shopping mall, racial or ethnic slurs likely to provoke a disturbance, or violates civil rights laws

Such blind application of the content-neutrality test to private shopping malls ignores the fundamental nature and purposes of such entities and exceeds the limited scope of *PruneYard*.

Worse yet, the Ninth Circuit's test imposes a standard of free speech accommodation that even the government itself is not required to meet. The government is allowed to regulate commercial speech, outlaw secondary boycotts, protect citizens against defamation, and proscribe fighting words or obscenity. *See Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) (secondary boycotts); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). Under the Ninth Circuit's test, however, private shopping malls are not afforded the same privilege in analogous situations.

Moreover, even if it were otherwise appropriate to treat private shopping malls as state actors for free speech purposes, the court of appeals also mistakenly

equates shopping malls to traditional public forums or designated public forums that otherwise are subject to such scrutiny. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983). The comparison is inapt.

In *Perry*, the Court reserved strict scrutiny to "places which by long tradition or by government fiat have been devoted to assembly and debate" or to "public property which the state has opened for use by the public as a place for expressive activity." *Id.* at 45. The Court distinguished these two types of forums from more limited public forums, particularly those where business is conducted, in which a much lower level of scrutiny is applied. *Id.* at 46-47. When the state acts as a proprietor rather than a regulator, it is given wide discretion. As such, the regulation need only be reasonable and viewpoint neutral. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Pertinent examples of limited public forums have included airports, city buses, and the federal workplace. *See id.* (airports); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (federal workplace); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (city transit systems).

As the Court observed in *Adderley v. Florida*, 385 U.S. 39, 47 (1966), "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." If private mall owners are to be subjected to the same burdens as the government, they should

at least share the same level of discretion in conducting their affairs as does the government.

3. The Ninth Circuit's broad rejection of commercially reasonable time, place, and manner rules gives rise to a taking in this case and sets a harmful precedent in support of takings in many others.

In allowing a limited physical invasion of private property in *PruneYard*, the Court relied upon the state's assurances that the shopping mall "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." 447 U.S. at 83.

The constitutional test for time, place, and manner rules is that they must (1) be content-neutral, (2) be narrowly tailored to serve a significant interest, and (3) leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This "intermediate scrutiny" test balances the regulation at issue, and the purpose to which it is directed, with the level of speech affected and the alternatives available.

In *PruneYard*, the expressive activity at issue was orderly and limited to common areas, and contained a message not otherwise hostile to mall operations. The same cannot be said in the present case. Here, in rejecting Rule 3 (signage ban), Rule 5

(designated areas rule), and Rule 6 (peak traffic rule), the Ninth Circuit not only misunderstood the nature of the rules, it improperly substituted its own judgment for that of the malls, in violation of *Ward*.

The "signage ban" is not in fact a ban, but a limit on size and placement – i.e., signs must be smaller than twenty-two by twenty-eight inches and mounted on tables – so as not to block or compete with commercial activities. The "designated areas rule" does not place expressive activity hundreds of yards from the public, but rather limits it to reasonable places to minimize disruption and congestion; the areas were in fact close to the targeted stores in this case. The peak traffic rule is not a tactic to keep expressive activity at bay, but a response to predictable safety and congestion problems that arise at certain times of the year, like the holiday season. Versions of such rules had previously been sanctioned in California courts. *See Costco Cos., Inc. v. Gallant*, 96 Cal. App. 4th 740, 753, 117 Cal. Rptr. 344 (Ct. App. 2002) (peak traffic days); *UNITE*, 56 Cal. App. 4th at 1010, 1014, 65 Cal. Rptr. at 838 (designated areas peak traffic days); *H-CHH Assocs. v. Citizens for Representative Gov't*, 193 Cal. App. 3d 1193, 1216, 1220, 238 Cal. Rptr. 841 (Ct. App. 1987), *disapproved on other grounds by Fashion Valley*, 42 Cal. 4th at 869 n.12, 172 P.3d at 754 n.12 (sign and peak traffic limits).

In *Ward*, the Court stressed that in assessing time, place, and manner rules, courts must defer to the reasonable determination of the regulator as to

whether a rule meets a stated property interest. 491 U.S. at 799. Moreover, as Judge Callahan observes in dissent, contrary to the majority's approach, shopping malls have different interests than municipalities. "Private property owners have an interest in avoiding interference with the commercial purposes of property." Pet App. 38-39 (Callahan, J., concurring in part, dissenting in part); *see also In re Hoffman*, 67 Cal. 2d 845, 852 n.6, 64 Cal. Rptr. 97, 101 n.6 (1967) (holding that "any appreciable interference with the orderly carrying on of business may suffice" to support expression limits in a rail station). In his concurring opinion in *PruneYard*, Justice Powell included "substantial annoyance to customers" as a factor that distinguishes legitimate private mall interests from those of a public square. 447 U.S. at 96 (Powell, J., concurring).

Even if a property owner has an obligation under state law to permit expressive activities on its property that are contrary to the owner's commercial interests and those of its many tenants, the owner should have the right to impose reasonable, content-neutral rules on usage of the property, including those that require visitors to not block or compete with mall activities, stay within designated areas, and limit their activities to off-peak times. If not, the mall effectively has no right to regulate its property to prevent inconvenience, annoyance, and perhaps even relevant harm to mall patrons, all of which would jeopardize the purposes of the mall and its tenants and their duties to all visitors.

C. Resolving the Constitutional Question of Private Property Ownership in this Case is Critical to Effective and Peaceful Labor-Management Relations Under the NLRA.

The NLRA is designed to promote industrial peace, *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401 (1952), and the NLRB is chiefly responsible for the development and application of national labor policy, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

In the present context, "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Consequently, "the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights." *Hudgens*, 424 U.S. at 521. In fulfilling its proper role it is therefore critical that the Board be equipped with a clear and consistent standard so as to protect collective labor activity within a constitutional system that protects private property from physical invasions.

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court held that state law, and not federal labor law, largely determines whether or not non-employee unions can access company property. *See id.* at 535.

However, the Court's deference to states in *Lechmere* does not foreclose other federal limits on property access (e.g., protections of time, place, and manner, or distinctions based on the type of property at issue). The NLRB is not immune from the requirements of the Fifth Amendment.

The Ninth Circuit's ruling fosters the undue expansion of NLRB authority through the constitutional violations described above. This case is not merely a free speech case, but is also a labor dispute ultimately governed by federal law. The non-representative union's activities were not limited to peacefully passing out leaflets, but included active picketing and a boycott that could have resulted in illegal secondary activity, or worse. Clear direction from the Supreme Court is needed to ensure that the NLRB properly handles free speech matters that potentially impair private property rights.

One need only consider the differences between the ALJ's opinion, the majority finding and partial dissent at the NLRB, and the majority holding and partial dissent at the court of appeals – not to mention the call for supplemental briefing after *Fashion Valley* – to conclude that guidance is needed. Indeed, the NLRB itself showed a lack of comfort with the current system by switching its position on the time, place, and manner rules at the rehearing stage after having defended them at every earlier point of the litigation.

The constitutional stakes are too high to vest the NLRB with unfettered discretion to decide the important constitutional law issues raised herein.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE MOUNTING TENSION BETWEEN THE STATE FREEDOMS OF SPEECH RECOGNIZED IN *PRUNEYARD* AND A MALL'S FIRST AMENDMENT RIGHT TO REFRAIN FROM SPEAKING.

As Justice Powell asserted in his concurrence in *PruneYard*, "state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." 447 U.S. at 97 (Powell, J., concurring). Although Justice Powell did not find enough of a conflict between the speech and property interests at issue in *PruneYard*, he argued that requiring a property owner to subsidize speech that is antithetical to the owner's interest could place the owner "in an intolerable position." *Id.* at 99. The Ninth Circuit's rejection of MPM's rules (particularly Rules 1, 2, and 4) presents the very dilemma predicted by Justice Powell and left open by *PruneYard*. In his dissent in *Fashion Valley*, Justice Chin described activity similar to the Union's here as follows: "Urging a boycott of [a mall's] businesses contradicts the very purpose of the shopping center's existence." 42 Cal. 4th at 870, 172 P.3d at 755 (Chin, J., dissenting).

The Ninth Circuit's ruling violates MPM's rights under the First Amendment by requiring it to effectively sponsor messages on its own property that are inimical to its commercial purpose. Likewise, the Ninth Circuit's "content-neutral" analysis of the malls' rules fails to recognize that a shopping mall may have expressive interests of its own. One scholar recently observed that, through the approach adopted by the state supreme court in *Fashion Valley* and thereby the Ninth Circuit in this case, "California obliges the commercial landowner to serve as the host for his own roasting." Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 Harv. J.L. & Pub. Pol'y 389, 396 (2009).

MPM's argument finds further support in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995), in which the Court unanimously held that, under the First Amendment, a state could not require private parade organizers to include a third-party's banner which contained a message with which the organizers disagreed. The Court observed that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Id.* at 576.

The "forced speech" aspect of the First Amendment is also reflected in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), where the Court held that a state cannot

require inclusion of a message from a third party with an energy company's bill, and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where the Court struck down a right-of-reply statute that the state attempted to impose on newspapers. In *Pacific Gas*, the Court observed that such First Amendment protection applies to corporations as well as individuals: "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." 475 U.S. at 16.

In *PruneYard*, the Court held that the First Amendment did not protect the mall there because (1) it was open to the public and therefore it was unlikely that the activity would be identified with the mall owner, (2) the state did not require any particular message, and (3) the mall had the ability to "disavow any connection with the message." 447 U.S. at 87. In *Pacific Gas*, however, the Court emphasized that, "[n]otably absent from *PruneYard* was any concern that access to [the mall] area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based." 475 U.S. at 12; *see also Hurley*, 515 U.S. at 580 (citing *Pacific Gas* in distinguishing *PruneYard* because, *inter alia*, the owner there did not object to the speech at issue). The same cannot be said for the activity in the present case, which involves speech that directly attacks the very purpose for which the malls exist.

As the Court observed in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the right to free speech includes the "right to refrain from speaking at all." In *PruneYard*, the Court held that this right to silence was not violated in the context of a shopping mall where it had the opportunity to respond. 447 U.S. at 88. However, by being forced to respond, the mall may actually offend many of its tenants' customers, thereby potentially damaging its own commercial interests as well as those of its tenants. Indeed, "private landowners suffer a loss of their free speech rights when forced to open their doors to controversial social or political expression, including opinions that they – or in the case of commercial enterprises, their customers – may find offensive." Sisk, *supra*, at 394. Perhaps, as in *PruneYard*, a mall can waive such rights if it does not object to the speech at issue. But that does not mean that the rights do not exist.

As Justice Powell observed in his concurring opinion in *PruneYard*, the rule in *Wooley* is implicated when a property owner finds the ideas being communicated on his property "objectionable enough to compel a response." 447 U.S. at 100 (Powell, J., concurring). Justice Powell cited a union being "compelled to supply a forum to right-to-work advocates" as but one example. *Id.* at 99. MPM would submit that a boycott of its entire operation would similarly demand a response. Furthermore, to the extent that the Union's activity targeted the practices of one of its tenants, it is also understandable that MPM would prefer not to get involved at all – the

right to neutrality is one of the chief reasons behind the NLRA's prohibition of secondary activity. *See NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 692 (1951) (describing the "shielding [of] unoffending employers and others from pressures in controversies not their own" as a main objective of 29 U.S.C. § 158(b)(4)).

The Union's activity in this case was not isolated or temporary. It was a concerted effort to boycott the malls and their stores. MPM appreciates its state law responsibility to allow orderly expression that is not hostile to mall business, pursuant to *PruneYard*. It similarly recognizes the rights of mall employees to organize and to engage in collective action, including action on mall property, pursuant to *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Neither situation lies here.

The Ninth Circuit's opinion undercuts MPM's message to the public to come and shop in a safe, secure, and welcoming environment. As such, it violates the malls' rights to free speech under the First and Fourteenth Amendments.

CONCLUSION

For all of the foregoing reasons, MPM respectfully submits that this Petition for a Writ of Certiorari should be granted.

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In The
Supreme Court of the United States

MACERICH MANAGEMENT COMPANY and
MACERICH PROPERTY MANAGEMENT COMPANY,

Petitioners,

v.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA LOCAL 586;
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA LOCAL 505; and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 848; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; AFL-CIO, and CARPENTERS LOCAL 505, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, *Petitioners*, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Intervenor*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 05-75295 NLRB Nos. 20-CA-29636-1 20-CA-29918-1

NATIONAL LABOR RELATIONS BOARD; MACERICH MANAGEMENT,

Petitioners,

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Intervenor,

v.

MACERICH MANAGEMENT COMPANY; MACERICH PROPERTY MANAGEMENT COMPANY,

Respondents.

Nos. 05-76217
05-77116

NLRB Nos.
20-CA-29636-1
30-CA-29918

OPINION

On Petition for Review of an Order of the National Labor Relations Board

Argued and Submitted
October 15, 2007 – San Francisco, California

Filed August 25, 2008

Before: Jane R. Roth,* Sidney R. Thomas, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Thomas;
Partial Concurrence and
Partial Dissent by Judge Callahan

---

* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

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Donald C. Carroll, Carroll & Scully, Inc., San Francisco, California, for amicus curiae California Labor Federation.

OPINION

THOMAS, Circuit Judge:

This petition for review presents the question of whether six restrictions on expressive activity promulgated and enforced by two California shopping

malls infringe on the free speech rights guaranteed by the California State Constitution and therefore interfere with protected union activity in violation of the National Labor Relations Act ("NLRA") when applied to union picketing and handbilling actions. We hold that the six rules impermissibly infringe free speech rights and unlawfully interfere with protected union activity.

I

Macerich Management Company and Macerich Property Management Company (collectively "Macerich") operate as the managing agents for Arden Fair Mall and Capitola Mall ("the Malls"), respectively. The Malls are enclosed, privately-owned shopping centers located in Sacramento, California, and Santa Monica, California. Macerich promulgated a list of "Rules for Public Use of Common Areas" that regulate expressive activity in each mall. Among these rules are the six at issue here:

> Rule 1 ("identification ban"): a ban on activities that identify by name the mall owner, manager, or tenants;
>
> Rule 2 ("commercial purpose rule"): a ban on signage and written materials that interfere with the "commercial purpose" of the mall;
>
> Rule 3 ("signage ban"): a ban on the carrying or wearing of signs;

> Rule 4 ("application requirement"): an application process that requires the presubmission of written materials;
>
> Rule 5 ("designated areas rule"): the exclusion of exterior areas, including mall sidewalks, from designated areas where expressive activities may occur; and
>
> Rule 6 ("peak traffic rule"): the prohibition of expressive activities during "peak traffic days."[1]

According to Macerich, the general purpose of these rules is to safeguard the commercial activity of the malls, provide shoppers with a pleasant shopping experience, and protect shoppers' safety.

On December 16, 1999, representatives of United Brotherhood of Carpenters and Joiners of America Local 586 ("Local 586") distributed handbills at the interior and exterior entrances of the Sears store at Arden Fair Mall, to protest the use of a nonunion contractor to build a Sears store in Roseville, California. Local 586 did not file an application with the mall beforehand, nor did it submit the handbills for pre-screening, because a union representative had been told by an Arden Fair employee that an application was unnecessary. Mall security guards

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[1] The challenged regulations are a small portion of the complete "Rules for Public Use of Common Areas," and are not numbered consecutively in those documents. We adopt the numbering used in the National Labor Relations Board ("NLRB" or "the Board") opinion.

informed the union representatives that they were trespassing and would be arrested if they remained on the premises. When the union representatives refused to leave, mall officials called the police and one representative was arrested. Later, a Local 586 representative filled out an application, which was denied as untimely, incomplete, and ambiguous. On December 21 and 22, 1999, Local 586 representatives went to Arden Fair Mall wearing shirts that said "Do Not Patronize Arden Fair Mall – Unfair to Carpenters."

On March 7, 2000, United Brotherhood of Carpenters and Joiners of America Local 505 representatives distributed handbills and picketed at Capitola Mall to protest the use of a nonunion contractor to build a new store in the mall, and to publicize an area standards dispute. The picketers left after the police arrived and warned them that they could be subject to citizen's arrest. Two weeks later, Local 505 representatives returned to Capitola Mall and again picketed the construction site. When they refused to leave, they were placed under citizen's arrest. On May 3, 2000, Local 505 representatives again picketed at Capitola Mall, this time protesting the use of another nonunion contractor. Four union representatives were arrested. In no instance did Local 505 complete an application beforehand or pre-submit written materials to the mall.

Locals 586 and 505 ("the Unions") each filed unfair labor practices charges against Macerich, alleging that Macerich had violated section 8(a)(1) of

the NLRA, 29 U.S.C. § 158(a)(1), by unlawfully restricting the Unions' expressive activities, unlawfully threatening union picketers with arrest, and having union picketers unlawfully arrested. The charges were consolidated by the NLRB General Counsel into a complaint alleging that Macerich had violated section 8(a)(1) by maintaining six rules that unlawfully interfere with expressive activity, and by ejecting union representatives from mall property for engaging in protected activity.

A hearing was conducted before Administrative Law Judge Jay R. Pollack, who concluded that Macerich had engaged in unfair labor practices by promulgating, maintaining, and enforcing each of the challenged rules, and by ejecting union representatives from mall property for engaging in protected activity. Macerich filed exceptions to ALJ Pollack's decision, and the Board's General Counsel filed cross-exceptions.

In 2005, the NLRB issued a decision affirming ALJ Pollack's decision in part. Specifically, the Board upheld ALJ Pollack's findings that the identification ban and the commercial purpose rule (Rules 1 and 2) were unlawful content-based restrictions under California law. The Board also upheld ALJ Pollack's finding that the application requirement (Rule 4) was unlawful when applied to ensure compliance with Rules 1 and 2. The Board further found, contrary to ALJ Pollack's decision, that the signage ban, the designated areas rule, and the peak traffic rule (Rules 3, 5, and 6) were reasonable time, place, or

manner restrictions under California law. The Unions filed a petition for review (Case No. 05-75295), arguing that Rules 3, 5, and 6 are unlawful; Macerich filed a petition for review (Case No. 05-77116), arguing that Rules 1, 2, and 4 are permissible; and the NLRB filed a petition for enforcement of its decision (Case No. 05-76217). The Unions then filed a motion to intervene in Case No. 05-77116. By orders of December 9, 2005, and January 24, 2006, we consolidated the petitions for review with the Board's application for enforcement, and granted the Unions' motion to intervene. We now grant the Unions' petition, grant in part and deny in part the Board's petition, and deny Macerich's petition.

We review the Board's decision to determine whether the Board's findings of fact are supported by substantial evidence in the record as a whole, and whether the Board correctly applied the law. *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 918 (9th Cir. 2006).

II

Section 7 of the NLRA guarantees employees the right to form labor unions, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid." NLRA § 7, 29 U.S.C. § 157. Section 8(a)(1) of the NLRA makes it an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees" in the exercise of their section 7 rights. NLRA § 8(a)(1),

29 U.S.C. § 158(a)(1). While the NLRA by its terms confers rights only on employees, the United States Supreme Court has determined that it also restricts an employer's right to exclude nonemployee union organizers from the employer's property. *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 535 (1992).

Under *Lechmere* and subsequent cases, the rights of nonemployee union representatives to access an employer's private property are based in state law. *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 217 n.21 (1994). Where state common law grants an employer the right to exclude nonemployee union organizers from its property, the NLRA guarantees access only if the union can show that employees are otherwise inaccessible to union organizers, and that the employees' section 7 rights outweigh the employer's property rights. *Lechmere,* 502 U.S. at 538. Where state law grants nonemployee union organizers the right to access the employer's property, a violation of these state rights will also be a violation of the NLRA. *Glendale Assocs., Ltd. v. NLRB,* 347 F.3d 1145, 1153 (9th Cir. 2003). Thus, the question of whether Macerich engaged in unfair labor practices by excluding the Unions' representatives turns on whether California state law grants union representatives the right to access private mall property.

In analyzing questions of state law, we are bound by the decisions of the state's highest court. *Glendale,* 347 F.3d at 1154. The California Supreme Court has determined that article I, section 2 of the California

Constitution protects expressive activities – including petitioning and picketing – conducted in privately-owned shopping centers. *Fashion Valley Mall, LLC v. NLRB,* 172 P.3d 742, 745 (Cal. 2007) (citing *Robins v. Pruneyard Shopping Center,* 592 P.2d 341 (Cal. 1979)). The California Supreme Court has repeatedly held that "private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks," and that a shopping center to which the public is invited provides "'an essential and invaluable forum'" for exercising free speech rights. *Id.* at 745, 746 (quoting *Pruneyard,* 592 P.2d at 341). For this reason, privately-owned shopping centers in California are required to respect individual free speech rights on their premises to the same extent that government entities are bound to observe state and federal free speech rights. *Glendale,* 347 F.3d at 1154. The California Supreme Court has recognized that this protection of expressive activities on private property is "'broader' and 'greater'" than that offered by the First Amendment to the United States Constitution. *Fashion Valley,* 172 P.3d at 749 (citing *Gerawan Farming, Inc. v. Lyons,* 12 P.3d 720, 735 (Cal. 2000)).

The free speech protection enshrined in the California Constitution is not absolute. Shopping malls may impose reasonable restrictions on the time, place, and manner of expressive activities. *Id.* at 750 (citing *Diamond v. Bland,* 477 P.2d 733 (Cal. 1970)). The level of scrutiny with which we review a

restriction on free speech activity depends on whether the restriction is a content-neutral regulation of the time, place, or manner of speech, or a content-based restriction. *Id.* at 751. A content-neutral restriction is subjected to intermediate scrutiny to determine whether it (1) is narrowly tailored, (2) serves a significant government interest, and (3) leaves open ample alternative avenues of communication. *Id.* A content-based restriction is analyzed under strict scrutiny to determine whether the regulation is necessary to serve a compelling interest and narrowly drawn to achieve that end. *Id.* at 754. Applying these tests, we conclude that Rules 1 (identification ban) and 2 (commercial purpose rule) are impermissible content-based restrictions, and Rule 4 (application requirement) is impermissibly content-based when applied to enforce Rules 1 and 2. We conclude that Rules 3 (signage ban), 5 (designated areas rule), and 6 (peak traffic rule) are content-neutral, but fail the intermediate scrutiny test for reasonable time, place, or manner restrictions.

A

We begin with the Unions' challenge to Rule 1, the identification ban. The Board held that the rule banning activities identifying by name the mall owner, manager, or tenants was identical to the rule

we held to be unlawful in *Glendale*.[2] In *Glendale*, we began by determining whether the rule was

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[2] Macerich contends that *Glendale* represents a misapplication of California law, and that the Board erred in relying on it. Even if we were not bound to follow *Glendale*, *see General Const. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005) ("[w]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions") (quoting *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 983 (9th Cir. 2002)), we would reject this argument.

First, Macerich argues that *Glendale* relied on *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999), and that *Calkins* has been discredited. While it is true that the cases identifying First Amendment free speech protections on private property relied on by *Calkins* have been overruled at the federal level, California cases like *Pruneyard* have incorporated their principles into California law. *See Fashion Valley*, 172 P.3d at 748-49; *Pruneyard*, 592 P.2d at 346. In addition, *Calkins* addressed free speech rights on the private property of stand-alone stores, which have not taken on the functional equivalence of a traditional public forum that was found to be the compelling reason for extending free speech rights in shopping malls in *Pruneyard*. *See* 592 P.2d at 347 n.5. *Glendale*, which discusses the free speech protections in shopping malls under California law, is good law despite the weaknesses in *Calkins*.

Macerich next argues that recent decisions of the California Court of Appeal limit *Pruneyard*'s application of free speech rights on private property. Specifically, Macerich points to *H-CHH Associates v. Citizens for Representative Gov't*, in which the California Court of Appeal upheld a shopping center's proscription on the solicitation of funds from patrons and stated that solicitation need not be permitted "when it is basically incompatible with the normal character and function of the facility." 193 Cal.App.3d 1193, 1221 (Ct. App. 1987). *Fashion Valley*, which reaffirmed *Pruneyard*, silences this argument. 172 P.3d at 748-49. The *Fashion Valley* court explicitly rejected

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content-based or content-neutral. 347 F.3d at 1155. Speech-regulating rules are considered content-neutral when the rules are not related to the subject or topic of the speech. *Id.* (citing *Ward v. Rock Against Racism,* 491 U.S. 781 (1989)).[3] Rules are generally considered content-based when the regulating party must examine the speech to determine if it is acceptable. *Id.* (citing *Desert Outdoor Adver. v. City of Moreno Valley,* 103 F.3d 814, 820 (9th Cir. 1996)). In *Glendale,* we determined that a rule prohibiting literature that included the name of a mall owner, manager, or tenant was content-based because the mall would have to review the literature to determine if it included an owner's, manager's, or tenant's name before approving the literature for distribution. *Id.* at 1156.[4] The same analysis applies here: the identification ban is content-based because Macerich would have to review the content of speech and literature to

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H-CHH to the extent that it suggested that speech may be prohibited if it competes with a shopping center's merchants. *Id.* at 753 n.12.

[3] California state courts borrow from federal First Amendment jurisprudence to analyze whether a rule is content-based or content-neutral. *Glendale,* 347 F.3d at 1155.

[4] In *Glendale,* we also found the rule to be content-based because it allowed exceptions for commercial literature naming a mall owner, manager, or tenant, and for literature from groups and persons who were in a primary labor dispute with a mall tenant. These additional details enhance the content-based nature of the regulation, but were not necessary to a finding that the regulation was content-based.

determine whether the speech violated the ban by naming a mall tenant, owner, or manager.

Because the identification ban is content-based, we next examine it to determine whether it survives strict scrutiny. *Id.* "Content-based regulations receive strict scrutiny because 'content-based restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used . . . to distort public debate.'" *Id.* at 1155 (quoting *City of Ladue v. Gilleo,* 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)).[5] Content-based restrictions are presumptively unconstitutional; a content-based restriction will pass constitutional muster "only if it employs the least restrictive means to further a compelling interest." *Id.* at 1156 (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992) and *Frisby v. Schultz,* 487 U.S. 474, 483 (1988)). The burden is on the regulating authority to prove that the restriction is justified without reference to the content of the speech. *Id.* (citing *Rock Against Racism,* 491 U.S. at 791). Courts have consistently struck down restrictions based in hostility or favoritism towards particular messages. *Id.* at 1157-58.

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[5] California state courts also draw from First Amendment jurisprudence to determine whether a content-based rule survives strict scrutiny under the California Constitution. *Glendale,* 347 F.3d at 1156.

In *Glendale,* the mall argued that its ban on the naming of an owner, manager, or tenant served its interest in ensuring that normal business operations were not disrupted. *Id.* We held that this stated interest was belied by the fact that the mall made an exception for speech promoting primary boycotts of mall tenants, speech that was likely to be the most disruptive of normal business operations. *Id.* at 1157. We also held that the rule was untenable because it was motivated by hostility towards messages that might adversely affect business. *Id.* at 1157-58. We stated, "[i]n restricting such critical speech about their tenants, owners, or managers, [the] rule contravenes the purpose of California free speech protections: the preservation of discussion of issues even when they are contrary to a regulating party's belief or interest. . . . The California Constitution does not permit censorship of contrary ideas." *Id.* at 1158.

Macerich asserts a similar interest here. Susan Valentine, Senior Vice President of Marketing for Macerich, testified that Macerich adopted the identification ban to protect the "good name" of the mall and its tenants. This stated justification exposes Macerich's hostility towards messages critical of the mall or its tenants. Because free speech protections were designed to protect critical speech, we cannot find the suppression of critical speech to be a compelling interest. We find that "[t]he Mall's purpose to maximize the profits of its merchants is not compelling compared to the Union's right to free expression." *Fashion Valley,* 172 P.3d at 754.

Macerich has provided no justification for the identification rule that does not reference the content of the speech. We therefore find that Rule 1 (the identification ban) does not survive strict scrutiny.

B

The same analysis applies to Rule 2, the commercial purpose rule. We begin by analyzing whether the rule is content-based or content-neutral. Rule 2 prohibits signage and written materials that interfere with the "commercial purpose" of the mall. As with the identification rule, this rule requires that the regulating authority examine the content of the written material to determine whether it complies with the rule. Like the identification rule, the commercial purpose rule is content-based.

Next, we address whether Rule 2 survives strict scrutiny. Valentine and Carmen Lytle, Arden Fair's General Manager, explained that the commercial purpose rule was intended to eliminate written materials that would financially damage the mall or its tenants. The Board concluded that the purpose of the rule was to "place restrictions on the content of the message so as to limit any negative publicity and not hurt sales." Rule 2 is entirely motivated by hostility towards messages critical of the mall or its tenants. Macerich offers no content-neutral justification for the rule. Therefore, the commercial purpose rule cannot survive a strict scrutiny analysis.

Our conclusion is supported by the California Supreme Court's recent decision in *Fashion Valley*. In *Fashion Valley,* the California Supreme Court analyzed a mall rule that prohibited speech "[u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center." 172 P.3d at 744. The Court determined that the rule was content-based because it distinguished favored speech from disfavored speech based on the ideas expressed: speech urging a boycott was prohibited, but other speech was not. *Id.* at 751-52.

Fashion Valley distinguished the boycott rule from rules prohibiting face-to-face solicitation of funds, which have been held to be content-neutral. The Court explained that solicitation bans are concerned with the manner of speech, and are directed at "the conduct and intrusiveness that face-to-face solicitation for immediate donation or exchange of funds inherently promotes." *Id.* at 752-53. *Fashion Valley* expressly rejected the mall's argument that the ban on speech advocating a boycott could be similarly justified as a restriction on the manner of speech. *Id.* at 750, 753 (rejecting the mall's argument that the boycott ban was "a 'reasonable regulation' designed to assure that free expression activities 'do not interfere with normal business operations' . . . "). Unlike solicitation, the Court noted, peacefully urging a boycott does not by

its nature cause congestion or promote fraud or duress. *Id.* at 753.

As the California Supreme Court noted, shopping centers are free to "prohibit *conduct* 'calculated to disrupt normal business operations' or that would result in 'obstruction of or undue interference with normal business operations.'" *Id.* (quoting *Diamond,* 477 P.2d at 733) (emphasis ours). However, "speech that does no more than attempt to peacefully persuade customers not to patronize a business cannot be banned on the ground that it interferes with normal business operations." *Id.* at 751 n.8. *Fashion Valley* explained that the "distinction between urging customers to boycott a business and physically impeding access to that business" is crucial. *Id.* The California Supreme Court also noted that citizens have a "strengthened interest, not a diminished interest, in speech that presents a grievance against a particular business in a privately owned shopping center, including speech that advocates a boycott." *Id.* at 750.

The commercial purpose rule at issue here, which was put in place to limit speakers' abilities to persuade customers not to patronize certain businesses, is an attempt to restrict the speakers' ability to persuade. The rule does not prohibit conduct that would interfere with normal business operations, but instead infringes upon the strong free speech interest in peacefully presenting a grievance to an offending business. Because limiting critical speech is an

impermissible regulatory goal, Rule 2 cannot survive a strict scrutiny analysis.

C

The NLRB correctly held that Rule 4 (application requirement), when used to enforce the unlawful Rules 1 (identification ban) and 2 (commercial purpose rule) is likewise unlawful. The Board reasoned that because the application process is used to screen written material for compliance with the rule banning the identification of a mall owner, manager or tenant, and with the rule banning signage that interferes with the commercial purpose of the Malls, the rule is content-based. We agree, and reiterate that the examination of the content of a speaker's message is the hallmark of a content-based rule. The application requirement becomes unlawful when used as a tool to ferret out objectionable content.

Our conclusion is consistent with that of the California Court of Appeal in *H-CHH,* in which the Court struck down as constitutionally defective an application process used to screen for expressive activity that would adversely affect the shopping center environment, atmosphere, or image. 193 Cal.App.3d at 1211.[6]

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[6] Macerich argues that our analysis should be guided instead by *Union of Needletrades, Industrial & Textile Employees, AFL-CIO v. Superior Court,* 56 Cal.App.4th 996 (Ct. App. 1997) ("*UNITE*"), in which the California Court of Appeal

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Macerich argues that even if Rules 1 and 2 are unlawful, the Board's order is overbroad because it invalidated the application process entirely, even when used to further legitimate goals like proper scheduling of events. This argument misstates the Board's order. The order enjoins Macerich from "[m]aintaining and enforcing a rule that requires the presubmission of written materials *for the purpose* of enforcing" the unlawful identification and commercial purpose rules (emphasis ours). We construe this statement to mean that the application process may remain in use insofar as it is used to promote legitimate time, place, and manner restrictions on expressive activities. So construed, there is nothing overbroad about the holding.

D

We turn to the Unions' challenge to Rule 3, the ban on carrying or wearing signs. The NLRB concluded that Rule 3 was a reasonable restriction on the time, place, or manner of speech. To be enforceable, restrictions on time, place, or manner must (1) be justified without reference to the content of the regulated speech, (2) be narrowly tailored to

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upheld an application process for expressive activity in a shopping mall. *UNITE* gives no guidance because the Court did not address whether the underlying restrictions on naming tenants and on interfering with the commercial purposes of the mall were valid, as it found that those issues had not been properly preserved for review. *Id.* at 1020-21.

serve a significant interest, and (3) leave open ample alternative channels for the communication of the information. *Berger v. City of Seattle,* 512 F.3d 582, 589 (9th Cir. 2008) (citing *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984)).[7] Failure to satisfy any single prong of this test invalidates a regulation. *Kuba,* 387 F.3d at 858 (quoting *Grossman v. City of Portland,* 33 F.3d 1200, 1205 (9th Cir. 1994)).

The Unions concede that Rule 3 is content-neutral, but argue that it is not narrowly tailored to promote a significant mall interest and does not leave open ample alternatives for communication. To prove that a regulation is narrowly tailored to serve a significant interest, the regulating authority must identify the interests served by the restriction and provide evidence that the proposed communicative activity endangers those interests. *Id.* at 858-59. Speculation as to what might happen if the proposed activity was allowed is insufficient. *Id.* at 859-60 (finding lack of evidence to support ban on demonstrating where city failed to provide evidence beyond a "first hand" account that "there is simply no space in the fire lanes or the concrete apron in which [demonstrators] would be safe . . . "). Studies, anecdotes pertaining to different locales, history,

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[7] California Courts apply federal precedent to determine whether a rule is a reasonable time, place, or manner restriction. *See Kuba v. 1-A Agric. Ass'n,* 387 F.3d 850 (9th Cir. 2004).

consensus, and "simple common sense" may serve as evidence that the proposed activity will endanger significant interests. *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064, 1073 (9th Cir. 2006). In the case of safety restrictions, for example, the regulating body need not wait until someone is injured before promulgating regulations. *Edwards v. City of Coeur d'Alene,* 262 F.3d 856, 865 n.16 (9th Cir. 2001).

Macerich argues that Rule 3 (signage ban) is justified by convenience, safety, and aesthetic concerns. Valentine testified that the signage ban is necessary to prevent people from having to walk out of their way to avoid expressive activities, keep signage looking professional, and protect individuals from injuries caused by signs or the sticks they are attached to. We generally consider safety and convenience to be valid regulatory objectives. *Berger,* 512 F.3d at 592. In at least some circumstances, we have recognized aesthetics to be a significant interest. *See Foti v. City of Menlo Park,* 146 F.3d 629, 637 (noting that while cities do have a substantial interest in protecting the aesthetic appearance of their communities by avoiding visual clutter, these interests may not be compelling). Common sense supports the idea that picketers' signs may inconvenience retailers and customers by blocking sight lines in shopping centers, although the record does not include evidence to reinforce this conclusion. Similarly, common sense suggests that rigid signs with sharp corners, especially if attached to sharp or heavy sticks, could pose a threat to safety.

While there may be sufficient common sense support for Macerich's assertion that the proposed communicative activity endangers significant interests, the signage ban is not narrowly tailored to serve those interests. For a regulation to be narrowly tailored, the stated interest must be served "less effectively absent the regulation," and the regulation may not "burden substantially more speech than is necessary to further the [regulating authority's] legitimate interests." *Kuba,* 387 F.3d at 861. The regulation need not advance the regulating authority's interests in the least restrictive or least intrusive way, *G.K.,* 436 F.3d at 1074, but the existence of numerous obvious and less-burdensome alternatives is relevant to the regulation's "fit," *Edwards,* 262 F.3d at 865 (quoting *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 418 n.13 (1993)).

The complete ban on wearing or carrying signs eliminates any safety or aesthetic concern associated with signs or sign poles. For that reason, it may be said that Macerich's interests would be served less effectively absent the ban.[8] However, Rule 3 burdens

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[8] The dissent would have us stop here, before analyzing whether the regulation burdens substantially more speech than is necessary to further Macerich's legitimate goals or determining whether numerous obvious and less-burdensome alternatives exist. The volume of speech burdened and the availability of numerous alternatives are appropriate considerations in a complete and thorough narrow tailoring analysis. We are not, as the dissent suggests, insisting that the challenged regulation be the "least restrictive means" for achieving

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substantially more speech than is necessary to further Macerich's legitimate interests. Rule 3 doesn't just ban speech that is communicated in dangerous or intrusive ways; it bans virtually all speech communicated visually through images and text.[9] Moreover, numerous obvious and less burdensome alternatives exist. The same safety considerations could be served by eliminating signs with particularly dangerous characteristics. Macerich could, for example, insist that signs be made from soft materials, have rounded corners, or be attached to cardboard poles. Aesthetic and convenience concerns could be promoted by restricting the size of signs or allowing demonstrators to wear signs in the form of lettering on t-shirts. Because the complete ban on carrying or wearing signs is substantially overbroad, it cannot satisfy the requirement that the restriction be "narrowly tailored."

Even if we held the signage ban to be narrowly tailored to serve a significant interest, it would fail intermediate scrutiny because it fails to leave open ample alternatives for communication.[10] *See Kuba,*

Macerich's goals. We agree that such an analysis would be inappropriate where, as here, intermediate scrutiny is the appropriate standard. *See, e.g., Ward,* 491 U.S. at 797.

[9] There are exceptions, of course. The Unions could have distributed handbills or attached two signs to a table within an area designated for expressive conduct.

[10] The dissent essentially asks us to ignore this prong of the analysis, stating that "the Supreme Court has repeatedly admonished lower courts not to use the 'ample alternative

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387 F.3d at 858. A regulation that effectively prevents a speaker from reaching his intended audience fails to leave open ample alternatives. *Edwards,* 262 F.3d at 866. Where "there is no other effective and economical way for an individual to communicate his or her message," alternative methods of communication are insufficient. *Id.* We will not invalidate a regulation merely because it restricts the speaker's preferred method of communication. *Id.; see also Savage v. Trammell Crow Co.,* 223 Cal.App.3d 1562, 1575 (Ct. App. 1990) ("The adequacy of alternative channels is not measured by the fondest hopes of those who wish to disseminate ideas."). However, a regulation that forecloses an entire medium of public expression across the landscape of a particular community or setting fails to leave open ample alternatives. *G.K.*, 436 F.3d at 1074. As we noted in *Foti,* free speech protections extend to the "right to choose a particular means or avenue of speech . . . in lieu of other avenues." 146 F.3d at 641.

We are particularly wary of any regulation that completely forecloses "a venerable means of communication that is both unique and important." *Gilleo,*

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channels' requirement as a means of overturning regulations." The cases cited by the dissent, however, stand for the proposition that this Court may not overturn a valid time, place, or manner restriction on the grounds that we disagree with the regulating authority's methods. *See, e.g., Ward,* 491 U.S. at 799. These cases do not suggest that the "ample alternative means" requirement is no longer a valid prong of the time, place, and manner analysis.

512 U.S. at 55. Picketing is one such venerable medium and has unique advantages over other forms of communication, including immediate recognition by passers-by. *Foti,* 146 F.3d at 641. In *Edwards,* we invalidated an ordinance banning the attachment of wooden or plastic supports to signs carried during parades and assemblies because "the classic image of a picketer – dating back to the early days of labor protests – is of an individual holding aloft a sign-bearing standard." 262 F.3d at 865.

Moreover, when picketing is the chosen means of communication, the location of the protest is particularly important. As the California Supreme Court reiterated in *Fashion Valley*: "When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure." 172 P.3d at 748 (citing *Diamond,* 477 P.2d at 733).

Here, the NLRB found that the signage ban left open ample alternatives for communication because the Unions were still able to advertise their dispute in the media and picket and handbill on public property. The Board now argues that the mall regulations allow the Unions to attach two signs to a table, thus granting them the advantage of immediate recognition by passers-by. We conclude that these alternatives are legally inadequate. While attaching two signs to a table might allow the Unions

to communicate with passers-by, such a communication method fails to convey the same message of protest associated with "an individual holding aloft a sign-bearing standard." Picketing and handbilling on public property, while preserving the symbolism of the hand-held sign, would fail to reach the Unions' intended audience: patrons of the Malls or of particular stores within the Malls. Physically removing the protest from the offending employer's location would seriously diminish the symbolic and economic impact of the message. Advertising the dispute in the media would similarly fail to target the desired audience, and is significantly more expensive. The signage ban left the Unions with a narrow range of ineffective options. Because the signage ban is not narrowly tailored and does not leave open ample alternatives for communication, the Board incorrectly applied the law in determining that Rule 3 was a reasonable time, place, or manner restriction.

E

The Board also found that Rule 5, excluding exterior sidewalks from the designated areas where expressive conduct may occur, was a lawful time, place, or manner restriction.[11] Because the Unions

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[11] Federal courts have consistently protected expressive activities on public sidewalks. *See, e.g., United States v. Grace*, 461 U.S. 171 (1983) (invalidating statute prohibiting distribution of leaflets and display of signs on sidewalks on Supreme Court grounds because not narrowly tailored). California courts

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concede that this rule is content-neutral, we begin by examining whether it is narrowly tailored to serve a significant interest.[12]

According to Valentine, limiting expressive activities to certain designated areas is necessary to preserve traffic flow and ensure compliance with fire codes. Macerich excluded sidewalks from the designated areas for expressive activities because of a

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have extended the same protection to privately-owned sidewalks surrounding privately-owned shopping malls. *See In re Lane,* 457 P.2d 561 (Cal. 1969) (reaffirmed in *Fashion Valley,* 172 P.3d at 747).

[12] The dissent avoids this analysis by claiming that the validity of a regulation restricting petitioning activities to two designated areas has already been determined by the California courts. The dissent cites the California Court of Appeals's decision in *UNITE,* 56 Cal.App.4th at 1012. The dissent then claims that a "state appellate court's determination of state law is binding and must be given deference," citing *Hicks v. Feiock,* 485 U.S. 624, 629-30, 630 n.3 (1988) for support. *Hicks* actually says that a federal court is not to apply a rule different from that stated by the state intermediate appellate court where "the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court." *Id.* at 630 n.3. This is not the case here. *Hicks* also states that "where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.* A thorough time, place, and manner analysis convinces us that the California Supreme Court would conclude that the exclusion of sidewalks from the designated areas for expressive activities violates free speech protections.

concern that mall patrons would have to step into the street to avoid expressive activity on sidewalks, thereby jeopardizing their safety. The Unions acknowledge that these safety and convenience interests are significant, but argue that the exclusion of sidewalks from the designated areas for expressive activity is not narrowly tailored to advance these interests.

Specifically, the Unions argue that the mall sidewalks are no different from – or narrower than – sidewalks in most downtown areas, on which expressive activities are permitted. This reasoning finds support in *Grace,* in which the United States Supreme Court stated, "the building's perimeter sidewalks are indistinguishable from other public sidewalks in the city that are normally open to the conduct that is at issue here. . . ." 461 U.S. at 182. The California Supreme Court has acknowledged that "[p]ersons can be excluded entirely from areas where their presence would threaten personal danger or block the flow of passenger or carrier traffic, such as doorways and loading areas." *In re Hoffman,* 434 P.2d 353, 358 (Cal. 1967). However, Rule 5 restricts significantly more than activity in doorways and loading areas.

The Unions argue that numerous obvious and less restrictive alternatives could achieve the Malls' goals. For instance, they suggest that fire code compliance could be ensured by regulations prohibiting expressive activities in entrances and other locations that must be kept clear. *Cf. Berger,* 512 F.3d

at 603 (upholding rule restricting expressive activity to sixteen designated locations because the rule furthered "significant city interests, by keeping street performances from posing threats to the flow and convenience of . . . patrons in heavily congested areas and entrances to buildings"). We agree, and add that regulations prohibiting the restriction of traffic flow on sidewalks would sufficiently address the other safety and convenience concerns.

Rule 5 also fails to leave open ample alternatives for communication. We have previously recognized that effective communication depends on the speaker's ability to address the intended audience. In *United States v. Baugh,* for example, we held that a

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[13] Macerich argues that *UNITE,* 56 Cal.App.4th at 1010-13, compels a contrary conclusion. We note that the rule discussed by the California Court of Appeal in *UNITE* prohibited a demonstration in front of a particular store because the demonstration would have violated a fire code. The *UNITE* court held that the preferred demonstration area was not an appropriate place to conduct expressive activities. *Id.* at 1012. In the situation at issue here, no fire code was shown to have been violated; there is no demonstrated reason that sidewalks are not an appropriate place for expressive activities. While the reasoning in *UNITE* was extrapolated to apply to several other mall rules, including rules that are more similar to Rule 5, the *UNITE* court did not perform a narrow tailoring analysis on any restriction other than that prohibiting a demonstration that would have violated a fire code. Because the analysis of whether a restriction on expressive activity is sufficiently narrowly tailored is necessarily a fact-specific inquiry, *see Berger,* 512 F.3d at 601-04 (analyzing whether several restrictions on the location of speech activities sufficiently matched the stated interests), *UNITE* does not guide our analysis here.

statute requiring a permit to demonstrate on National Park property was unlawful when applied so as to refuse a group permission to demonstrate in front of a Park's visitors' center. 187 F.3d 1037, 1044 (9th Cir. 1999). We noted that the demonstrators were ordered to a "First Amendment area" 150 to 175 yards away from the visitors' center where their target audience was located, and that this was an insufficient alternative for communication because the demonstrators were "left with no alternative that allowed [them] to reach [their] intended audience." *Id.*

Here, the Malls cover large areas and have numerous entrances. By banning expressive activity on sidewalks and confining expressive activity to designated areas which may be hundreds of yards from any given store or its patrons, Macerich has effectively cut off access to the Unions' intended audience(s). The fact that the Unions may still advertise their dispute in the media, and picket and handbill on public property, again fails to cure the constitutional infirmity. Because Rule 5 is not narrowly tailored and does not leave open ample alternatives for communication, it is not a lawful time, place, or manner restriction.

F

Finally, we turn to Rule 6, the prohibition on expressive activities during peak traffic periods. As applied by both Malls, Rule 6 prohibits expressive

activity throughout almost the entire holiday shopping period: the time from Thanksgiving through the end of December. During this period, mall traffic doubles, and the Malls' tenants do 75% of their yearly business. Based on this evidence of increased mall traffic, the Board found the peak traffic rule to be justified by interests in public safety, preserving traffic flow, and controlling congestion.

A complete ban on expressive activities is narrowly tailored only where "each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. Macerich has failed to explain how banning every expressive activity during peak times advances a significant interest. Instead, Macerich attempted to justify the entire ban as a "common sense" measure to decrease crowding during peak times. Numerous less restrictive alternatives would promote the same interest, including a limit on the number of individuals engaged in expressive activities at any one time.[14] Although a regulation

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[14] The Board points to *H-CHH* and *UNITE*, in which California courts upheld similar restrictions on expressive activities during peak traffic periods, to support its conclusion that the peak traffic rule is permissible. Because neither *H-CHH* nor *UNITE* explicitly addressed whether the regulations in question were narrowly tailored, we do not find them informative in this analysis. The dissent also cites *Costco Cos., Inc. v. Don Gallant*, 96 Cal.App.4th 740, 753 (Ct. App. 2002). The context in *Costco* was markedly different from that in the present case. Costco supplied evidence that petitioner gatherers in its store had directly interfered in the store's business, and imposed considerable expenses, administrative burdens, and

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need not be the least restrictive method of advancing a compelling interest, *G.K.*, 436 F.3d at 1074, the complete ban at issue here is certainly overbroad.

The complete ban on expressive activities, more than any of the other mall rules, fails to leave open ample alternatives for communication. Again, Macerich suggests the alternatives of media advertising, demonstrations on public property, and expressive activity in the Malls during the days of the year when such activity is not entirely prohibited. As discussed above, the options of media advertising and picketing on public property are neither effective nor economical. Limiting expressive activity to non-peak times eliminates the opportunity to comment upon or criticize – directly and in-person – tenants' actions during the time that they make 75% of their sales, and forecloses any chance of effectively reaching a large percentage of the target audience. For these reasons, the peak traffic rule is not a reasonable time, place, or manner restriction.

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risks. *Id.* at 750-51. Petition gatherers had physically and verbally abused staff and customers, and altercations between proponents and opponents of particular petition gathering efforts had escalated to the point that rifles had been pointed at petition gatherers. *Id.* at 751-52. Given these circumstances, the court determined that Costco had the right to impose regulations designed to protect its business operations, and that limiting interferences to its less profitable days was a rational restriction. *Id.* at 753.

III

Rules 1 (identification ban) and 2 (commercial purpose rule) are impermissible content-based restrictions on expressive activity. Rule 4 (application requirement) is likewise unlawful when used to enforce Rules 1 and 2. Rules 3 (signage ban), 5 (designated areas rule), and 6 (peak traffic rule) are content-neutral, but cannot be justified as reasonable restrictions on the time, place, or manner of expressive activities. Because the promulgation and enforcement of each of these rules impermissibly infringes on the free speech rights preserved by the California Constitution, we hold that the Malls had no right to exclude union representatives from their premises under state law. The enforcement of the contested mall rules against Union representatives, and the exclusion of the Union representatives from mall property, was therefore a violation of section 8(a)(1). We grant the Unions' petition, grant in part and deny in part the Board's petition, and deny Macerich's petition.

PETITIONS GRANTED IN PART; DENIED IN PART

CALLAHAN, Circuit Judge, concurring in part and dissenting in part:

I agree that Macerich's efforts to impose content-based restrictions (rules 1, 2, and 4) on speech do not survive strict scrutiny. I respectfully dissent from

the majority's holding that Macerich's admittedly content-neutral time, place, and manner restrictions (rules 3, 5, and 6) are unlawful under the National Labor Relations Act ("NLRA") because the California courts have approved the challenged restrictions. The federal courts may not ignore state case law balancing the freedom of expression under the state constitution against state property laws; particularly where there is no federal right to engage in the particular expressive activity on private property.

In labor relations, "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to *limited* judicial review." *NLRB v. Truck Drivers Local Union No. 449,* 353 U.S. 87, 96 (1957) (emphasis added). We accord considerable deference to the National Labor Relations Board's ("NLRB" or "Board") interpretation of the NLRA as long as it is "rational and consistent" with the statute. *NLRB v. Calkins,* 187 F.3d 1080, 1085 (9th Cir. 1999). We uphold decisions of the NLRB on appeal if the findings of fact are supported by substantial evidence and if the agency correctly applied the law. *Retlaw Broadcasting Co. v. NLRB,* 172 F.3d 660, 664 (9th Cir. 1999). It is well-settled that the NLRB is bound by state law when determining the right of nonemployee union representatives to access an employer's private property. *See Thunder Basin Coal Co. v. Reich,* 510

U.S. 200, 217 n.21 (1994); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992). Therefore, it follows that if California courts hold that a time, place, or manner restriction is permissible under California law, then the NLRB should be entitled to rely on those cases when attempting to determine if a mall has violated NLRA section 8(a)(1).

A. California courts properly apply intermediate scrutiny to content neutral restrictions on free speech on private property.

A content-neutral time, place, and manner restriction must be "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for the communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Whether a regulation leaves open ample alternative channels for communication of the information requires analyzing if the message "could not be communicated in other ways" and the barriers to conveying the intended message. *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 294 (1984). "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under [*United States v.*] *O'Brien*[, 391 U.S. 367, 377 (1968)], so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the

regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). "The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Id.*

There is no federal right to engage in First Amendment activity that is unrelated to the business of a privately owned shopping center. *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972). California has chosen to provide additional protection for expressive activity in private shopping malls under article I, section 2 of the California Constitution. *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 749-50 (Cal. 2007). California courts have concluded, however, that shopping malls may impose reasonable time, place, and manner restrictions upon speech. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979); *see also Fashion Valley Mall*, 172 P.3d at 754 (reaffirming that "[s]hopping malls may enact and enforce reasonable regulations of the time, place, and manner of such free expression to assure that these activities do not interfere with the normal business operations of the mall . . . "). California law allows content-neutral regulation of speech by municipalities and private actors if the regulations are narrowly tailored to protect a proper municipal or private interest. *See In re Hoffman*, 434 P.2d 353, 355-56 (Cal. 1967) (discussing balancing use of property for municipal or private purposes and the

First Amendment). Because California courts apply the exact same scrutiny to time, place, and manner restrictions on First Amendment activity as federal courts, the NLRB is entitled to rely upon a California court's determination that restrictions similar to those imposed by Macerich are proper methods of protecting private property rights under state law.

B. The majority's decision fails to give proper deference to the mall's time, place, and manner regulation of the wearing and carrying of signs.

Macerich has not imposed a complete ban on the use of signs, but rather has a rule that "[p]articipants may not carry or wear any signs, posters or placards."[1] Macerich *allows* posters, placards, displays and signs that are smaller than 22 inches by 28 inches and are affixed to a table "so as not to endanger any person or property, block the view of any tenant's store or display, or directly compete with Center activities or the business displays or logos of Center tenants."

California courts have recognized that private property owners have different interests than municipalities for the purposes of balancing those interests against First Amendment rights. *In re Hoffman*, 434 P.2d at 355 n.3. Private property owners have an interest in avoiding interference with the commercial

[1] Strangely, the majority omits the first part of the rule, which states, "[p]articipants may hold clipboards and leaflets."

purposes of property.[2] *Id.* at 356-67. This includes an "interest in controlling litter and traffic," *Savage v. Trammell Crow Co., Inc.*, 273 Cal. Rptr. 302, 307 (Cal. App. 1990), and consideration of "whether the number and/or size of signs, posters or placards will interfere with and/or directly compete with business displays or logos." *H-CHH Assocs. v. Citizens for Representative Gov't*, 238 Cal. Rptr. 841, 856 (Cal. App. 1987) ("*H-CHH*") *disapproved on other grounds by Fashion Valley Mall*, 172 P.3d at 754 n.12. Under California law, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Savage*, 273 Cal. Rptr. at 307 (quoting *Albertini*, 472 U.S. at 689).

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[2] The majority claims that the state court decisions approving content-neutral restrictions on expressive activity do not include the right to exclude. California courts have repeatedly stated that unprotected interference with the operation of commercial property may result in expulsion. *See In re Hoffman*, 434 P.2d at 357 (stating that "[h]ad petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave"); *Slauson P'ship v. Ochoa*, 5 Cal. Rptr. 3d 668, 686 (Ct. App. 2003) (stating "our analysis starts with the fact that because the Mall is private property, Slauson did have the right to exclude persons from entering the Mall, and persons who entered the property without its permission were trespassing."); *Albertson's, Inc. v. Young*, 131 Cal. Rptr. 2d 721, 738 (Ct. App. 2003) (noting failure to comply with rules triggers the owner's right to stop the activity).

In this case, restricting the union members from wearing signs or carrying pickets promotes Macerich's substantial interest in making sure that protesters do not block access to stores or the sightlines for store displays or impede foot traffic. That interest "would be achieved less effectively absent the regulation." *Id.* As already noted, California courts have stated that commercial property owners may "consider[ ] whether the number and/or size of signs, posters or placards will interfere with and/or directly compete with business displays or logos." *H-CHH Assocs.*, 238 Cal. Rptr. at 856.

The majority concludes that the ban on wearing or carrying signs does not leave open ample alternatives for communication, speculating about the adequacy of various alternatives including Macerich's allowance of two signs attached to a table. The Supreme Court, however, requires us to give deference to reasonable determinations that substantial interests are best served by the restriction at issue. *See Ward*, 491 U.S. at 799 ("The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician.").[3] In

[3] Indeed, the Supreme Court has repeatedly admonished lower courts not to use the "ample alternative channels" requirement as a means of overturning regulations. *See Ward*, 491 U.S. at 799 (reversing because "[t]he alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control

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fact, the Court has stated that the "less restrictive-alternative analysis has never been part of the inquiry into the validity of a time, place, and manner regulation." *Ward,* 491 U.S. at 787 (internal quotations and citations omitted). The Court went on to conclude that it is error to "sift[ ] through all the available or imagined alternative means of regulating [activity] in order to determine whether the city's solution was 'the least intrusive means' of achieving the desired end."[4] *Id.*

The proper analysis is whether Macerich's rules "foreclose an entire medium of public expression across the landscape of a particular community or setting." *Menotti v. City of Seattle,* 409 F.3d 1113,

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of volume is appropriate or how that level of control is to be achieved"); *Albertini,* 472 U.S. at 689 ("The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests"); *Clark,* 468 U.S. at 299 ("The Court of Appeals' suggestions . . . represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.").

[4] To the extent that the majority analyzes "numerous and less burden-some alternatives" to Macerich's regulations to conclude they were not narrowly tailored, this is an improper least-restrictive means analysis. *See Ward,* 491 U.S. at 787.

1138 (9th Cir. 2005) (quotations omitted). "In the 'ample alternatives' context, the Supreme Court has made clear that the First Amendment requires only that the government refrain from denying a 'reasonable opportunity' for communication." *Id.* at 1141 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986)). Foreclosing one narrow form of expression while allowing "myriad and diverse" alternatives for reaching the intended audience does not violate the First Amendment. *One World One Family Now v. City & Cty. of Honolulu*, 76 F.3d 1009, 1014 (9th Cir. 1996).

The majority assumes that picketing includes the right to wear or carry signs. The Board, however, has noted that "picketing does not require the holding of a sign." *Laborers Int'l Union of N. Am.*, 287 NLRB 570, 573 (1987) (citing *United Mine Workers of Am., District 12*, 177 NLRB 213, 218 (1969)). I cannot find any authority that defines picketing to necessarily include the carrying or wearing of signs. *See Frisby*, 487 U.S. at 483 (noting ordinance stated that pickets "need not be carrying a sign"). Macerich's rule forbidding the wearing or carrying of signs did not ban "picketing."[5] Indeed, I conclude that Macerich's

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[5] There is no absolute right to picket. *See Frisby*, 487 U.S. at 486-87 (noting that picketing can be offensive and intrusive). The passage from the California Supreme Court's decision in *Fashion Valley Mall* cited in support of a broader picketing right concerned content-based restrictions on picketing activity, not a content-neutral restriction. *See Fashion Valley Mall*, 172 P.3d at 748 (discussing *Diamond v. Bland*, 477 P.2d 733, 741 (Cal.

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rule foreclosed only one method of "picketing" and did not categorically deny the unions of their ability to express their dissatisfaction with the use of non-union labor.

Macerich's rules left open ample alternative means for the unions to communicate their message to the mall patrons. The union could have used a table with two signs staffed by members, and Macerich's rules allowed union members to carry clipboards and leaflets with additional information for mall patrons. The majority mentions that Local 586 representatives went to Arden Fair Mall wearing shirts that said "Do Not Patronize Arden Fair Mall – Unfair to Carpenters," but fails to note that there is no evidence that Arden Fair Mall ejected the union representatives for wearing those shirts. Union members were free to wear or carry signs on the public sidewalks surrounding the malls' parking lots. The union had "myriad and diverse" alternatives for communicating their messages to mall patrons.

As the majority acknowledges, under California law, "the adequacy of alternative channels is not measured by the fondest hopes of those who wish to disseminate ideas." *Savage,* 273 Cal. Rptr. at 308 (citing *Clark,* 468 U.S. at 295). Although no California

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1970), which invalidated a rule that "all activity apart from regulated, mutually beneficial business promotions and displays, whether by tenants or strangers, is forbidden on the premises of the Center").

case has expressly approved of a rule banning the wearing or carrying of signs, an intermediate court has noted that commercial establishments are free to establish restrictions on the size and number of signs, placards, and posters. *H-CHH Assocs.,* 238 Cal. Rptr. at 856. Thus, the California cases indicate that the California Supreme Court would uphold a commercial property owner's right to ban the wearing or carrying signs, placards, or posters as narrowly tailored and leaving ample alternative channels for communication and deny the petition. *See Calkins,* 187 F.3d at 1089 (discussing how to interpret state law).

C. The designated areas rule and the peak days restriction have been expressly approved by California courts.

In *In re Hoffman,* 434 P.2d at 358, the California Supreme Court stated:

> Reasonable and objective limitations can be placed on the number of persons who can be present for First Amendment activities at the same time, and the persons present can be required so to place themselves as to limit disruption. In areas normally subject to congestion, such as ticket windows and turnstiles, First Amendment activities can be prohibited. Persons can be excluded entirely from areas where their presence would threaten personal danger or block the flow of passenger or carrier traffic, such as doorways and loading areas.

In *Union of Needletrades, Indus. & Textile Employees v. Superior Court,* 65 Cal. Rptr. 2d 838, 847 (Ct. App. 1997) ("*UNITE*"), a California Court of Appeal held that "a shopping center is constitutionally empowered to enact a rule limiting expressive activities to a particular area." The union wanted to distribute leaflets outside of Guess?, Inc. stores located in six different malls instead of in the designated areas provided by the shopping centers. *Id.* at 847-48. The state appellate court rejected the union's "most effective point of persuasion" argument, concluding that the California Supreme Court's decision in *Pruneyard,* 592 P.2d at 347, approving of time, place, and manner restrictions "to assure that these activities do not interfere with normal business operations" allowed the restriction of nonemployee union protesters to designated areas of the shopping center.[6] *UNITE,* 65 Cal. Rptr. 2d at 849. The state court concluded that "a center can impose reasonable and objective limitations on the number of persons who can be present and those persons can be required to be in an area so as to limit disruption." *Id.* at 848. As a result, the state appellate court held that several

[6] Although under the First Amendment the nature of the message may create a stronger interest in the symbolic location of the activity and the ability to reach a specific audience, *see Galvin v. Hay,* 374 F.3d 739, 747-52 (9th Cir. 2004), California has not given additional protection to symbolic locations or more specific audiences (as opposed to mall patrons in general) to expressive activity on private commercial property. *See UNITE,* 65 Cal. Rptr. 2d at 849 n.4 (rejecting the most effective point of persuasion argument).

rules, including rules restricting petitioning activity to two designated areas in the malls, were valid time, place, and manner restrictions under California law. *Id.* at 848-49.

This case is no different, and if the restriction of petitioning activity to two designated areas is acceptable under California law, the NLRB must follow California law.[7] *Lechmere,* 502 U.S. at 538. California courts have balanced the expressive rights of unions under the California Constitution against property owners' rights under state property law. This is a question of state law that we are not free to reject. *West v. AT&T,* 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law. . . ."); *see also Calkins,* 187 F.3d at 1095 (noting that if California provides additional protection, it does so by modifying state property law).

The majority's reliance on the unavailability of the sidewalks and entrances immediately outside the stores to conclude that Macerich's restrictions are not narrowly tailored is also not supported by California law. *See Lushbaugh v. Home Depot U.S.A.,* 113 Cal. Rptr. 2d 700, 707 (Ct. App. 2001) (noting designated

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[7] To the extent the majority once again engages in an analysis of potential alternative regulations and relies upon the existence of less restrictive means to invalidate the restriction, their reasoning is improper under Supreme Court precedent. *See Ward,* 491 U.S. at 787; *Albertini,* 472 U.S. at 689.

areas may be located away from motorized traffic, foot traffic, and entrances).[8] Furthermore, California courts have concluded that the additional protection of speech in shopping malls under state law does not include a right to conduct activity at the most effective point of persuasion. *UNITE,* 65 Cal. Rptr. at 849 n.4 (collecting cases). The Board properly relied on *UNITE* in its decision; therefore, the Board's decision is "rational and consistent" with California law.[9] *Calkins,* 187 F.3d at 1085.

Similarly, California courts have upheld so-called "peak days" restrictions in *H-CHH,* 238 Cal. Rptr. at 858 (approving of ban on heavy traffic days if the dates are set forth in writing); *UNITE,* 65 Cal. Rptr. 2d at 850 (approving of "holiday blackout periods" ranging from 25 specific days to the period between the weekend before Thanksgiving through January 2 of the next year); and *Costco Cos., Inc. v. Gallant,* 117

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[8] The California appellate court in *Lushbaugh* specifically cited to *Xiloj-Itzep v. City of Agoura Hills,* 29 Cal. Rptr. 2d 879, 889-90 (Ct. App. 1994), which applied the narrowly tailored test in upholding a ban on vehicle-addressed solicitation.

[9] The majority states that Macerich did not show that the demonstration violated a fire code. The Board specifically found that the designated area rule "assists the Respondent with complying with local fire codes." The malls introduced evidence that local fire codes required eight to ten foot clearances around entrances, and that the sidewalks were not sufficiently large to accommodate those clearances. I am unable to locate any authority requiring that Macerich establish a fire code violation before the fire code can be a substantial interest under the narrowly tailored test.

Cal. Rptr. 2d 344, 353-54 (Ct. App. 2002) (affirming restrictions on expressive activity on 34 busiest days). Indeed, Macerich's rule restricting expressive activity on 30 peak business days, accompanied by the list of unavailable dates, is more lenient than the restriction approved by the state court in *Costco Cos, Inc.* by four (4) days. In *UNITE,* the state appellate court approved restrictions on expressive activity spanning between the weekend before Thanksgiving through January 2nd, a period of forty-two (42) days. Accordingly, the Supreme Court's opinion in *Lechmere,* 502 U.S. at 535, as well as our own precedents, mandate that we accept state law and uphold the Board's determination that Macerich's peak days limitations are a valid time, place, and manner regulations.

The majority attempts to distinguish the California cases by stating that they do not discuss whether the rules are narrowly tailored. Both *UNITE* and *H-CHH* contain numerous citations to *In re Hoffman, Savage*, and other California cases specifically applying intermediate scrutiny to time, place, and manner restrictions. In fact, *UNITE* specifically refers to other portions of the days limitations under a "content neutral" analysis as being "narrowly drawn" and then approves the blackout periods as "[e]qually appropriate" under California law. *UNITE,* 65 Cal. Rptr. 2d at 850. It is clear that the California courts in *UNITE* and *H-CHH* were applying intermediate scrutiny to content-neutral restrictions. We are not free to ignore clear state law precedents simply because their

analysis was not as explicit as we would like. Even if *UNITE* and *H-CHH* fail to discuss intermediate scrutiny with sufficient clarity, the majority completely ignores the state court's analysis in *Costco* that:

> Costco's regulation is narrowly tailored because it protects Costco's substantial interests in the smooth operation of its stores on those days, which represent less than 10 percent of a calendar year, when those legitimate interests are most vulnerable to the disruption which expressive activity has from time to time engendered at Costco's stores. Because the 34-day ban is content neutral and leaves more than 300 other days during the calendar year in which expressive activity is permitted, it satisfies the remaining requirements of a valid regulation of time, place, and manner.

117 Cal. Rptr. 2d at 354.

We are bound by a state court's interpretation of state law when reviewing the NLRB's determination of whether there has been a violation of section 8(a)(1) of the NLRA when the NLRB must balance section 7 expressive rights against state property rights. *Thunder Basin Coal Co.*, 510 U.S. at 217 n.21; *Glendale Assocs.*, 347 F.3d at 1152; *Calkins*, 187 F.3d at 1088. We may not substitute our interpretations of California law for that of the California courts of appeal. *See Hicks v. Feiock*, 485 U.S. 624, 629-30, 630 n.3 (1988) (noting state appellate court's

determination of state law is binding and must be given deference). "[O]nly state courts may authoritatively construe state statutes." *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 577 (1996). "In the absence of convincing evidence that the state supreme court would decide differently, 'a federal court is obligated to follow the decisions of the state's intermediate courts.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1494 n.4 (9th Cir. 1996) (quoting *In re Kirkland,* 915 F.2d 1236, 1239 (9th Cir. 1990)). The majority's opinion fails to give deference to state law, and appears to misuse the requirement of ample alternative channels to conduct a least-restrictive means analysis to invalidate content-neutral rules. In doing so, the majority disregards state cases approving the types of content-neutral restrictions Macerich imposed on expression for its malls, disapproves of the Board's proper reliance on state law, and attempts to create expressive rights under California law at the expense of state property rights.

Accordingly, I dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 848; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; AFL-CIO, and CARPENTERS LOCAL 505, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, *Petitioners,* UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Intervenor,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 05-75295 NLRB Nos. 20-CA-29636-1 20-CA-29918-1

NATIONAL LABOR RELATIONS BOARD; MACERICH MANAGEMENT, *Petitioners*, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Intervenor*, v. MACERICH MANAGEMENT COMPANY; MACERICH PROPERTY MANAGEMENT COMPANY, *Respondents*.	Nos. 05-76217 05-77116 NLRB Nos. 20-CA-29636-1 30-CA-29918 ORDER

Filed October 28, 2008

Before: Jane R. Roth,* Sidney R. Thomas, and Consuelo M. Callahan, Circuit Judges.

ORDER

The joint motion filed on September 18, 2008, to correct the caption is GRANTED. The caption of the opinion filed on August 25, 2008, is corrected to read:

* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 05-75295

NLRB Nos.
20-CA-29636-1
20-CA-29918-1

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505,

Intervenors,

v.

MACERICH MANAGEMENT, COMPANY; MACERICH PROPERTY MANAGEMENT COMPANY,

Respondents.

No. 05-76217

NLRB Nos.
20-CA-29636-1
30-CA-29918

OPINION

MACERICH MANAGEMENT COMPANY; MACERICH PROPERTY MANAGEMENT COMPANY,

Petitioners,

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505,

Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 05-77116

NLRB Nos.
20-CA-29636-1
30-CA-29918

INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND CALIFORNIA BUSINESS PROPERTIES ASSOCIATION; CALIFORNIA LABOR FEDERATION,

Amicus Curiae.

The Clerk of Court is instructed to correct the Court's docket to reflect these changes.

Macerich Management Company *and* United Brotherhood of Carpenters and Joiners, Local 586, United Brotherhood of Carpenters and Joiners of America, AFL-CIO

Macerich Property Management Company *and* Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Cases 20-CA-29636-1 and 20-CA-29918-1 (formerly 32-CA-18123-1)

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 26, 2001, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondents and the General Counsel filed exceptions, briefs in support of exceptions, and respective answering and reply briefs.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

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[1] The Charging Party filed a joinder in reply brief of the counsel for the General Counsel.

[2] We have modified the recommended Order and notice to more accurately reflect the violations found.

I. INTRODUCTION

This case raises the issue of whether six rules maintained and enforced by two California shopping malls constituted reasonable time, place, and manner restrictions under State law. Applying California law, we find for the reasons discussed below that the Respondents violated Section 8(a)(1) of the Act by unlawfully restricting the content of picket signs, handbills, and other written materials. Thus, we agree with the judge that Respondent Macerich Management Company (MMC) unlawfully threatened union handbillers with arrest at Arden Fair Mall on December 16, 1999. Contrary to the judge, however, we find that Respondents' ban on the carrying or wearing of signs, their requirement that all expressive activities occur in "designated areas," and their ban on all expressive activity during peak traffic times are reasonable time, place, and manner restrictions that do not violate the Act. Also, contrary to the judge, we find that Respondent Macerich Property Management Company (MPMC) unlawfully threatened union picketers with arrest at Capitola Mall on March 7, 2000, and had union picketers unlawfully arrested on March 21 and May 3, 2000.

II. FACTS

Arden Fair and Capitola Malls, located in Sacramento and Capitola, California, respectively, are enclosed regional shopping centers. Respondent MMC operates Arden Fair, and Respondent MPMC operates

Capitola.[3] Both use the same set of rules for regulating expressive activities other than those sponsored by the malls or their tenants as well as "activity otherwise expressly allowed . . . by the National Labor Relations Act or state labor laws." Both use standardized internal policies and guidelines to implement the rules. Any individuals seeking to engage in expressive activity at these two malls must first file an "Application for Access for Non-Commercial Expressive Activities" on a form provided by the Respondents. By signing the application, each applicant agrees to abide by the malls' rules of conduct. Both malls also maintain a code of conduct applicable to all mall visitors.

A. The Challenged Rules

The rules alleged to be impermissible include: (1) a ban on activities that identify by name the mall owner, manager, or mall tenants; (2) a ban on signage and written materials that interfere with the "commercial purpose" of the mall; (3) a ban on the carrying or wearing of signs; (4) an application process that requires the pre-submission of written materials; (5) the exclusion of exterior areas, including mall sidewalks, from designated areas where activities may occur; and (6) the prohibition of

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[3] The two Macerich companies employ the same corporate staff and exist as two different entities only because the two ownership structures for the malls are different.

activities during "peak traffic days" on the exterior areas of the mall, including sidewalks.

According to Suzanne Valentine, the Respondent's marketing vice president, the general purpose of these rules was to protect the commercial activity of the center, provide shoppers with a pleasant shopping ambience, and to protect shoppers' safety. As for each rule's specific purpose, the general manager of Arden Fair, Carmen Lytle, testified that the ban on activities identifying the mall owner, manager, or tenants was to control negative publicity. As Valentine explained, "[W]e can't allow somebody to just come in and make a statement about us that is not true." Referring to the ban on signage that interferes with the "commercial purpose" of the mall, Lytle stated that it made no sense to allow anything that would hurt the owner or tenants financially.

According to Valentine, the ban on carrying signs was necessary to prevent any negative impact on the businesses, to prevent people from having to walk out of their way to avoid the expressive activity, to keep any signage looking professional, and to protect individuals from getting injured, e.g., by the sticks attached to the signs. Lytle admitted that the main purpose of requiring presubmission of written materials was to ensure compliance with the ban on identifying the mall owner or tenants by name as well as the ban on signage that interfered with the malls' "commercial purpose." According to Valentine, limiting activity to certain designated areas was to allow "easy traffic flow" and to comply with local fire

codes, which varied by jurisdiction. Sidewalks were excluded from the designated areas for expressive activity because they were not wide enough and shoppers might be forced to walk into the street to avoid that activity. The peak traffic ban, prohibiting all non-commercial expressive activity during the busiest shopping days of the year, was necessary to lessen the impact that any "extracurricular kinds of activities" might have on the malls' primary business of generating retail sales.

B. The Union Conduct

On December 16, 1999, Local 586 handbilled at the interior and exterior entrances to the Sears store at Arden Fair to protest the use of a nonunion contractor, Wadman Construction, to build a store in Roseville, California. Local 586 did not file an application beforehand because the Union's representative, Tom Brodsky, had been told by an Arden Fair employee that one was not necessary. Mall officials called the police after the handbillers refused to leave, and one of the union representatives was arrested. Brodsky went to Arden Fair after hearing about difficulties with mall security. At that time, he learned about the mall's rules and the requisite application, which he completed that same day. On December 22, the application was denied as untimely, incomplete, and ambiguous.

On March 7, 2000, Local 505 handbilled and picketed at Capitola Mall because a mall store,

Gottschalk's, was building an Expressions store at Capitola using a nonunion contractor, Construction Developers. Two picketers walked back and forth at the jobsite in front of a temporary wall inside the mall, not blocking ingress or egress. The picketers left after the police arrived and warned them that they would be subject to citizen's arrest. Two weeks later, on March 21, four Local 505 representatives again picketed the Gottschalk's Expressions jobsite inside Capitola. When they refused to leave, they were placed under citizen's arrest. On May 3, 2000, Local 505 once again picketed inside the mall, this time immediately outside the store Software Etc., where Hardcastle Construction, a nonunion contractor, was performing work. Four picketers were arrested. Local 505 never completed applications beforehand.

III. ANALYSIS

California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), 592 P.2d 341, affd. 447 U.S. 74 (1980). The pertinent principles of Board law are set forth in *Glendale Associates, Ltd.*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003):

> In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property (unless the employees are inaccessible

> through usual channels). In the absence of a private property interest, however, the Court's holding in *Lechmere* is not controlling. See *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993) ("employer's exclusion of union representatives from private property to which the employer lacks a property right entitling it to exclude individuals likewise violated Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities"). See also *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), [enfd. sub nom. *NLRB v. Calkins*], 187 F.3d 1080 (9th Cir. 1999).
>
> The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. *Bristol Farms*, 311 NLRB at 438. The Board does so because it is State law, not the Act, that creates and defines the employer's property interest. Thus, an employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. Id. at [4]38; *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

See also *Fashion Valley Shopping Center*, 343 NLRB 438 (2004).

Applying these principles to the facts of this case, we agree with the judge that the Respondents' ban on activities that identify by name the mall owner, manager, or tenant in the mall; ban on signage and written materials that interfere with the "commercial

purpose" of the malls; and the requirement of the presubmission of written materials are content-based restrictions and not time, place, and manner restrictions permissible under California law. Accordingly, we find that the Respondents' maintenance and enforcement of these rules violated Section 8(a)(1).

The judge properly found that the rule banning activities that identify by name the mall owner, manager, or tenants is identical to the rule found to be unlawful in *Glendale Associates*, supra. As in *Glendale*, we find "no evidence" here demonstrating how this rule "promote[s] the kind of time, place, and manner restrictions that would pass muster under California law." Id. Indeed, this rule, on its face, is content based. See *Glendale Associates v. NLRB*, supra, 347 F.3d at 1155 ("rule restricting expressive activity that names a [mall] tenant, owner, or manager is a content-based restriction on speech and fails to survive strict scrutiny"). Thus, the only purpose served by this rule is "to shield the Respondents' tenants . . . from being the subject of otherwise lawful handbilling." Id. at 28. Therefore, like the judge, we find this rule violates the Act.

We also find that the rule banning signage and written materials that interfere with the "commercial purpose" of the malls violates the Act. The purpose of this rule was to place restrictions on the content of the message so as to limit any negative publicity and not hurt sales. Plainly, the Act does not prohibit employees and their unions from asking consumers to boycott stores, even when the dispute is with another

person. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988) (*DeBartolo II*). The Respondents' broad ban on all activity that "interferes with the commercial purpose" of the malls clearly would prohibit this protected activity. See *In re Cox*, 474 P.2d 992, 1003 (Cal. 1970). Because this rule solely regulates content, we find that it violates the Act.

The application process, which requires the pre-submission of written materials, also violates the Act. Lytle, Arden Fair's general manager, admitted that she used this rule to screen written materials for compliance with the other rules banning activity that identifies the mall owner, manager, or tenants and banning signage that interferes with the "commercial purpose" of the malls. Accordingly, this rule regulates the content of written materials and signage, and does not seek to reasonably regulate the time, place, or manner in which they are displayed. Thus, the Respondents' application process violates Section 8(a)(1) of the Act.

Further, because the Respondent required Locals 586 and 505 to complete an application and abide by rules that are impermissible under California law, we find, contrary to the judge, that the Respondent MPMC violated Section 8(a)(1) by threatening to arrest, and actually arresting, picketers at the Capitola Mall on March 7 and 21, and May 3, 2000. See *H-CCH Associates v. Citizens for a Representative Government*, 238 Cal. Rptr. 841, 858 (Cal. Ct. App. 1987).

Contrary to the judge, however, we find that the Respondents' ban on the carrying or wearing of signs does not violate Section 8(a)(1). The judge found that this rule was a content-based restriction prohibited under *Glendale*, supra. We find, rather, that this rule is a permissible "manner" restriction under California law.[4] That is, it bans a particular manner in which a message is conveyed.

The Respondents manage enclosed shopping malls, whose corridors are often filled with people. The mall has a legitimate concern in ensuring the safety of its patrons and, to that effect, protecting them from being struck and possibly injured by a sign in an enclosed area. The rule also addresses the legitimate concern that the display of such signs could interfere with the sight lines of a store window. Clearly, the Respondents have the right to prevent interference with normal business operations and ensure public safety, and they are entitled to considerable deference in determining the best possible way to achieve these goals.

Furthermore, this finding is in accord with California law. In *Savage v. Trammell Crow Co.*, 273 Cal. Rptr. 302 (Cal. Ct. App. 1990), the court allowed a shopping center to ban entirely the distribution of

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[4] In this regard, we note that the Respondents have not banned all signs from the malls. The Respondents simply used their discretion to regulate the carrying and wearing of signs, i.e., the "manner" in which signs will be displayed.

leaflets from the parking lot. The court noted that *Robins,* supra, recognized a shopping center owner's right to "freedom from disruption of normal business operations and freedom from interference with customer convenience." Id. at 306. In this case, the record established that one of the Respondents' purposes in adopting this rule was to ensure the smooth and normal operation of the Respondents' business. The court also noted that the "validity of regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method." Id. at 308. Similarly, the Board's consideration of whether this rule violates the Act does not allow the Board to substitute its own judgment about safety and interference with normal business operations for that of the Respondents. Because the restriction is reasonably designed to ensure public safety and to prevent disruption with the malls' normal business operations, the restriction is in accord with California law, and thus not violative of Section 8(a)(1).

We also find, contrary to the judge, that the Respondents' designated areas requirement and peak traffic ban do not violate Section 8(a)(1). Relying on the plurality opinion in *Sears v. San Diego District Council of Carpenters*, 599 P.2d 676 (Cal. 1979),[5] the

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[5] In *Sears*, the California Supreme Court recognized a labor union's right to engage in labor picketing on private sidewalks and parking lots outside a stand alone store. The plurality opinion rested on the "Moscone Act," Cal. Civ. Proc. Code

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judge concluded that the Respondents had no property right to exclude or restrict union activity from the exterior sidewalks of the malls. *Sears*, however, cannot be relied on as controlling California precedent. In *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), the D.C. Circuit certified questions to the Supreme Court of California asking: (1) whether the employer in that case had a general right under California law to prevent members of the public from engaging in expressive activity in the parking lot and walkways adjacent to its store; and (2) if so, whether, as *Sears* suggests, California law nevertheless permitted union organizers to distribute literature there because they were involved in a labor dispute with the employer. *Waremart*, supra at 871. When the Supreme Court of California refused to answer the questions certified to it, the D.C. Circuit issued its opinion in *Waremart* holding that *Sears* "does not [represent current California law] and that the National Labor Relations Board erred in relying on that decision." *Waremart*, supra at 874.[6]

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§ 527.3, and its special protection for labor activity, not on the State Constitution.

[6] The D.C. Circuit stated that the special protection for labor-related expressive activity embodied in *Sears* constitutes impermissible content discrimination in violation of the First Amendment. See *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (exempting labor picketing from restrictions applicable to other picketing violated First Amendment); *Carey v. Brown*, 447 U.S. 455 (1980) (same).

As set forth above, the Board looks to State law to determine whether an employer has a property right to oust union representatives. In the instant case, the most recent and definitive statement of California law was made in *Waremart* where the court declared unequivocally that Sears does not represent California law. We are aware of no California court that has disagreed with that assertion.

We recognize that *Sears* and *Waremart* involved the Moscone Act and "stand-alone" stores, while the instant case involves a shopping mall and an asserted state constitutional right to picket there. Thus, the fact that *Sears* no longer applies is not a complete answer to the instant case. For, as noted supra, persons and organizations in California have a State constitutional right to come onto the "ministore downtown" of a shopping mall, subject to restrictions of "time, place and manner." We therefore turn to the question of whether the designated area and peak traffic ban rules are valid under the framework of *Robins v. Pruneyard Shopping Center*, supra, i.e., whether they are reasonable time, place, and manner restrictions. For the reasons set forth below, we conclude that they are.

As the judge noted, limiting expressive activity to the designated areas serves important safety interests by ensuring enough space on each side of an area for "traffic flow." The rule also assists the Respondents in complying with local fire codes. In addition, sidewalks were excluded from the

designated areas because they were not wide enough to accommodate expressive activity and mail patrons, who might then be forced to walk in the street to avoid the activity.

Likewise, the peak traffic ban was needed to lessen the impact that any "extracurricular kinds of activities" might have on the increased foot traffic and the large volume of sales that occur during the holiday season. In support of its peak traffic ban, the Respondents testified that more than 75 percent of its tenants' sales are made during this holiday period and that patrons are lost to competitors if the Respondent is unable to control congestion and traffic flow during the busy holiday season.

California case law clearly teaches that designated area and peak traffic restrictions are reasonable restrictions to prevent disruption of normal business operations. In *Needletrades Employees v. Superior Court of Los Angeles County ("UNITE")*, 65 Cal. Rptr. 2d 838 (Cal. Ct. App. 1997), cited with approval by the Board in *Glendale Associates*, supra, a California appellate court upheld similar designated area and peak traffic ban rules. The court noted that "in promulgating time, place, and manner rules governing when, where, and how a group may exercise expressive rights, a shopping center is constitutionally permitted to protect 'important rights of substance; . . . freedom from disruption of normal business operations and freedom from interference with customer convenience.'" Id. at 847, quoting *H-CHH Associates,* supra. The court ultimately

upheld the designated area rule of two malls, citing "legitimate concerns, such as public safety, traffic congestion, and free flow of commerce in the mall." Id. at 849. Similarly, the court also upheld each mall's peak traffic ban because the malls "had offered evidence to explain and justify that temporary ban." Id. at 850.

Like the malls in *UNITE*, the Respondents are reasonably concerned about ensuring public safety, avoiding traffic congestion, and keeping mall traffic flowing. The Respondents have shown that they have a legitimate safety concern that the width of the sidewalk is incompatible with demonstrations because mall patrons might be forced into the street to avoid the activity. Furthermore, the Respondents have shown a need to maintain "traffic flow" and to comply with local fire codes. Under the clear standard set forth in *UNITE*, the "designated area" rule is reasonable.

The peak traffic ban upheld in *UNITE* is also comparable to the peak traffic ban at issue here. In *UNITE*, the court upheld the rule simply because the malls in that case, without contradiction, had "offered evidence to explain and justify that temporary ban." Id. at 850. Similarly, the record shows that the Respondents have offered evidence to justify their ban. Specifically, the Respondents' witnesses testified, without contradiction, that their traffic doubles during these peak periods. In order to accommodate this increased traffic, the Respondents have decided to curtail certain activities to ensure that the

increased traffic does not interfere with commercial operations. Furthermore, the record also shows that Respondents curtail their own noncommercial activities, e.g., construction, in the malls during these critical periods to avoid exacerbating the congestion problem.[7]

In assessing the reasonableness of the Respondents' rules, we also note that the Unions have available all nontrespassory avenues of protest. We do not suggest that the presence of alternative means can be the sole reason for banning activity in certain areas. However, we find that it is relevant to the question of whether the rules are reasonable that the Unions can, for example, advertise their dispute in the media, and can picket and handbill on public property. Thus, there are "ample alternative channels for communication of the information." *Savage*, 273 Cal. Rptr. at 307 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). It does not matter that the Unions prefer to engage in their activity in certain areas of the Respondents' property on any day they choose.[8] "The adequacy of alternative

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[7] See also *Costco Cos. v. Gallant*, 117 Cal. Rptr. 2d 344 (Cal. Ct. App. 2002) (the court upheld a similar peak traffic ban, noting that the ban was narrowly tailored to protect the stores' substantial interest in the smooth operation of its business during the busiest days of the year and that it was content neutral and left 300 other days during the calendar year in which expressive activity was permitted).

[8] In fact, California law expressly grants to property owners the right to restrict the place where expressive activity may

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channels is not measured by the fondest hopes of those who wish to disseminate ideas." *Savage*, supra at 308.

For all of the foregoing reasons, we find that the Respondents' rules that ban the carrying or wearing of signs, that restrict expressive activity to designated areas, and that ban expressive activity during peak traffic periods, are reasonable time, place, and manner restrictions under the law of California. It follows that the rules are legal under the Act. See *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 537 (1992).

ORDER

The National Labor Relations Board orders that

A. The Respondent, Macerich Management Company, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule banning activities that identify by name the Arden Fair Mall owner, manager, or tenants.

(b) Maintaining and enforcing a rule that bans signage and written materials that "interfere with the commercial purpose" of the Arden Fair Mall.

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occur. *Robins v. Pruneyard Shopping Center*, supra, 592 P.2d at 347.

(c) Maintaining and enforcing a rule that requires the presubmission of written materials for the purpose of enforcing the rules cited in paragraphs 1(a) and (b), above.

(d) Interfering with handbilling or picketing at Arden Fair Mall by maintaining an unlawful application policy.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules indicated in paragraphs 1(a) through (c) above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Arden Fair Mall, and from any other document within the custody and control of Macerich Management Company wherever such rules may be contained.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of Arden Fair Mall in Sacramento, California, copies of the attached notice marked "Appendix A."[9] Copies of the notice, on forms provided

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by

(Continued on following page)

by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to the public are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1999.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. The Respondent, Macerich Property Management Company, Capitola, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule banning activities that identify by name the Capitola Mall owner, manager, or tenants.

(b) Maintaining and enforcing a rule that bans signage and written materials that "interfere with the commercial purpose" of the Capitola Mall.

(c) Maintaining and enforcing a rule that requires the presubmission of written materials for the purpose of enforcing the rules cited in paragraphs 1(a) and (b), above.

(d) Interfering with handbilling or picketing at Capitola Mall by maintaining an unlawful application policy, by threatening to cause the arrest of, and by causing the arrest of individuals affiliated with Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules indicated in paragraphs 1(a) through (c) above, and remove the language from

the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Capitola Mall, and from any other document within the custody and control of Macerich Property Management Company wherever such rules may be contained.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of Capitola Mall in Capitola, California, copies of the attached notice marked "Appendix B."[10] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to the public are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and former employees employed by the Respondent at any time since March 7, 2000.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

California law permits the exercise of free speech in private shopping malls, subject to reasonable, content-neutral time, place, and manner regulations by the property owner. *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979). This case turns on the reasonableness of certain rules the Respondents maintain and enforce concerning noncommercial expressive activity at Arden Fair and Capitola Malls.

Contrary to the majority, I would find that the Respondents' ban on the carrying or wearing of signs, their requirement that all expressive activity occur only in "designated areas" located inside the malls, and their ban on all expressive activity during peak traffic times ("peak traffic ban") on the malls' exteriors, are unlawful, because they are not narrowly tailored.[1] I address each of the three rules in turn:

1. The ban on signs

The Respondents contend that the ban on wearing or carrying of signs is necessary to ensure the safety of mall patrons and to prevent interference with the malls' commercial purpose. Rather than regulating the manner in which signs may be carried or worn – either by limiting the sign's size or simply banning the sticks attached to those signs – that rule totally eliminates the protected right to picket. In doing so, the Respondents have used means substantially broader than necessary to meet their asserted goals of safety and protecting commercial interests.[2] In finding that the Respondents have

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[1] I agree with the majority that the rules which ban activities that identify by name the malls' owners, managers, or tenants, which ban signage and written materials that interfere with the "commercial purpose of the mall," and which require pre-submission of all written materials, are unlawful because they are not content-neutral.

[2] Cf. Savage *v. Trammell Crow Co.*, 273 Cal. Rptr. 302, 308 (Cal. Ct. App. 1990) (upholding leafleting ban that is "narrowly

(Continued on following page)

failed to narrowly tailor this rule, as required by California law, I am not substituting my business judgment for that of the Respondent. Clearly, this blanket prohibition is not a reasonable time, place, and manner restriction.

2. The designated-areas rule and the peak-traffic rule

The rule requiring all noncommercial expressive activity to be conducted in designated areas within the malls' interiors, and the other rule banning all such activity during peak traffic periods, also violate the Act.

Relying on *Sears v. San Diego District Council of Carpenters*, 599 P.2d 676 (Cal. 1979),[3] the judge concluded that the Respondents had no property right to exclude or restrict union activity from the malls' exterior sidewalks. While this case was pending before the Board, however, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Waremart Foods v. NLRB*,[4] questioning

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drawn"), review denied (Dec. 13, 1990), cert. denied 500 U.S. 906 (1991).

[3] In *Sears*, the California Supreme Court recognized a labor union's right to engage in picketing and handbilling on private sidewalks and parking lots.

[4] 354 F.3d 870 (D.C. Circuit 2004), denying enforcement of the Board's order in *Winco Foods*, 337 NLRB 289 (2001) (holding that a nonunion supermarket had engaged in unfair labor

(Continued on following page)

the continued validity of *Sears*.[5] Because I am aware of no California Supreme Court or intermediate appellate court decision that speaks to the issue of access to the exterior sidewalk of a shopping center (as opposed to a stand-alone store), for purposes of deciding this matter, I assume that under *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979),[6] a shopping center may impose reasonable time, place, and manner regulations on exterior sidewalk activity (and not just on interior activity).[7]

Contrary to the majority's view, the Respondents have not offered sufficient *objective* evidence to justify their total ban on noncommercial expressive activity from the malls' exterior sidewalks. For example, the Respondents' witnesses testified in a conclusory manner that the sidewalks outside the mall are only of average width, and would not accommodate a large

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practices by attempting to bar union organizers from distributing literature in the store's parking lot).

[5] Although California law appears to protect labor-related handbilling on private property, the D.C. Circuit reasoned that to the extent that the State law afforded special protections to labor handbilling, it was content discriminatory in violation of the First Amendment. 354 F.3d at 874–875. While the D.C. Circuit did not directly overturn the California law – it instead "construe[d] it to avoid unconstitutionality." Id. at 875.

[6] *Robins* involved California constitutional standards applicable to any expressive activity, as opposed to *Sears*, which involved special standards under California law applicable to only labor activity.

[7] Accordingly, I find it unnecessary to pass on whether *Sears* is still good law.

group of people. Rather than narrowly tailoring the rules to address the number of people who could be present on the sidewalk while still allowing the expressive activity, the Respondents simply banned all expressive activity from the sidewalk.[8] Such a rule is overbroad, and accordingly is contrary to California law. *In re Hoffman*, 434 P.2d 353, 358 (Cal. 1967). These rules do not pass constitutional muster just because the Locals have access to the malls' interiors. *See H-CCH Associates v. Citizens for a Representative Government*, 238 Cal. Rptr. 841, 853 (Cal. Ct. App. 1987) ("A regulating authority may not adopt rules which preclude the exercise of free expression in an appropriate place, even on the ground that another place is available."), review denied (Oct. 29, 1987), cert. denied, 485 U.S. 971 (1988).

The Respondents, and the majority, rely on decisions of lower California courts that have upheld similar designated area and peak traffic bans. In particular, they refer to *Needletrades Employees v. Superior Court of Los Angeles*, 65 Cal. Rptr. 2d 838 (Cal. Ct. App. 1997) ("UNITE"). The facts in that case, however, are distinguishable. Thus, one mall owner in UNITE presented evidence that allowing a union to handbill directly in front of a specific store would violate local fire regulations, and that the designated areas the union objected to "were selected to comply

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[8] Cf. *Costco Cos. v. Gallant*, 117 Cal. Rptr. 2d 344, 347 (Cal. Ct. App. 2002) (restricting expressive activity to designated areas in front of the store by a maximum of three handbillers).

with [those] regulations." Id. at 848. Conversely, in this case, the Respondents offered no evidence that expressive activity on the malls' sidewalks was prohibited by any governmental regulations. Indeed, the rules enacted by the other *UNITE* mall owners were lawful because the time, place, and manner regulations concerning expressive activity were based on multiple objective criteria. Id.

Similarly, this case is distinguishable from *Costco*, supra, 117 Cal. Rptr. 2d at 344. Although the rules at issue in that case, as here, involved a peak traffic ban, the record amply supported the rationale for the store owner's ban as well as its other restrictions. Id. at 352. Thus, the store owner "presented evidence that expressive activity at its stores had imposed upon it considerable expense, administrative burdens and risks which directly impaired the commercial purpose of the stores." Id. Here, conversely, the Respondents have offered no evidence that expressive activity interfered with normal business operations or could be reasonably expected to do so.[9]

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[9] Thus, this is case is also distinguishable from *Savage*, supra, 273 Cal. Rptr. at 306, where Trammell Crow "could reasonably conclude" that without a ban on leafleting in the parking lot, the amount of litter would increase. The court found the policy "especially appropriate in light of the fact that [the] policy here does not prevent leafleting on the center's sidewalks." Id. Here, the Respondents have excluded the Unions from all exterior areas.

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and enforce a rule banning activities that identify by name the Arden Fair Mall owner, manager, or tenants.

WE WILL NOT maintain and enforce a rule that bans signage and written materials that "interfere with the commercial purpose" of Arden Fair Mall.

WE WILL NOT maintain and enforce a rule that requires the presubmission of written materials for the purpose of enforcing the two rules cited above.

WE WILL NOT interfere with handbilling or picketing at Arden Fair Mall by maintaining an unlawful application policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rules indicated above, and remove the language from the rules for non-commercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Arden Fair Mall, and from any other document within our custody and control wherever such rules may be contained.

MACERICH MANAGEMENT CO.

APPENDIX B

NOTICE TO EMPLOYEES
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NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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WE WILL NOT maintain and enforce a rule that bans signage and written materials that "interfere with the commercial purpose" of Capitola Mall.

WE WILL NOT maintain and enforce a rule that requires the pre-submission of written materials for the purpose of enforcing the two rules cited above.

WE WILL NOT interfere with handbilling or picketing at Capitola Mall by maintaining an unlawful application policy, by threatening to cause the arrest of, and by causing the arrest of individuals affiliated with Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT rescind the rules indicated above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Capitola Mall, and from any other document within our custody and control wherever such rules may be contained.

MACERICH PROPERTY MANAGEMENT CO.

Shelly Brenner, for the General Counsel.

Thomas J. Leanse, Stacey McKee Knight, and Karen Stephenson (Katten, Muchin & Zavis), of Los Angeles, California, the for Respondents.

Sandra Rae Benson, Kristina L. Hillman, and *William Sokol (Van Bourg, Weinburg, Roger & Rosenfeld),* of Oakland, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, March 20-29, 2001. On June 2, 2000, United Brotherhood of Carpenters and Joiners, Local 586, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 586) filed the charge in Case 20-CA-29636-1 alleging that Macerich Management Company (Respondent Macerich Management) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). On May 3, 2000, United Brotherhood of Carpenters and Joiners, Local 505, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 505) filed the charge in Case 20-CA-29918-1, formerly known as Case 32-CA-18123-1, alleging that Macerich Property Management Company (Respondent Macerich Property) committed certain violations of Section 8(a)(1) of the Act. The Union filed an amended charge on September 8, 2001. On March 16, 2001, the Regional Director for Region 20 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondents alleging that they violated Section 8(a)(1) of the Act. Both Respondents filed timely answers to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On

the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Macerich Management is a California corporation, with offices and places in various locations in California, and is engaged in the business of managing properties, including Arden Fair Mall Shopping Center in Sacramento, California. Respondent Macerich Property is a California corporation, with offices and places of business in various locations in California, and is engaged in the business of managing properties, including the Capitola Shopping Center in Capitola, California. Respondents stipulated and I find that they were each an employer within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Respondents admit and I find that Local 586 and Local 505 are each a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The complaint alleges that Respondent Macerich Management and Respondent Macerich Property committed violations of Section 8(a)(1) at Arden Fair Mall and Capitola Mall, two California shopping centers which Respondents respectively manage, by: (1) maintaining and enforcing overly broad and unreasonably restrictive time, place, and manner access rules: and (2) ejecting and/or causing the arrest of union representatives who were engaged in peaceful area standards activities on Respondents' respective mall properties.

The rules alleged to be impermissible are virtually identical at the two malls: (1) a ban on activities that identify by name the mall owner, manager, or any tenant in the mall: (2) a ban on signage and written materials that interfere with the "commercial purpose" of the mall; (3) a ban on the carrying or wearing of signs; (4) an application process that requires the pre-submission of written materials; (5) the exclusion of the malls' exterior areas, including mall sidewalks, from designated areas where activities may occur; and (6) the application of the malls' prohibition on activities during "peak traffic days" to the malls exterior areas.

With respect to specific incidents of Respondents' unlawful interference with the access rights of union representatives, the complaint alleges that on December 16, 1999, Respondent Macerich Management unlawfully ejected representatives of Local 586 from Arden Fair Mall at a time when Local 586 representatives were engaged in peaceful area standards handbilling at the interior entrances of the targeted employer within the mall. The complaint also alleges that on March 7 and 21, and May 3, 2000, Respondent Macerich Property ejected and/or caused the arrest of representatives of Local 505 from Capitola Mall at a time when the Local 505 representatives were engaged in peaceful area standards picketing at the interior entrances of the targeted employers within the mall. In their timely answers, Respondents denied that it engaged in the unfair labor practices alleged.

B. Facts

1. The malls

Arden Fair mall consists of a large two-story enclosed building, about three blocks long and a couple of blocks wide. The building is surrounded by private sidewalks and parking lots. There is a public sidewalk running along the exterior of the property.

The anchor tenants of Arden Fair mall, such as Sears, J.C. Penny's, and Nordstrom, own their own buildings and the underlying land on which the buildings are located. The remaining property is

owned by Arden Fair Associates, a general partnership. Arden Fair Associates leases space to the other tenants occupying the mall. A Reciprocal Easement Agreement (REA) between Arden Fair Associates and the anchor tenants provides the parties to the REA with reciprocal easements over the common areas of their respective properties for the passage of all users of the mall, and the passage and parking of vehicles. The common areas include the parking structures, parking lots, perimeter sidewalks and interior corridors of the mall. The easements also entitle Arden Fair Associates and the anchor tenants to eject individuals from the common areas who are not authorized to be on the property. At all times material, Arden Fair Associates has contracted with Respondent Macerich Management to provide all necessary services for management of Arden Fair Mall, including the Arden Fair Associates' management responsibilities under the REA.

Capitola Mall consists of a one to two-story enclosed building surrounded by parking lots and exterior sidewalks. The anchor tenants, such as Sears and Mervyn's, own their own buildings and the underlying land on which the buildings are located. The remaining property is owned by The Macerich Partnership, a general partnership. The Macerich Partnership leases space to the other tenants occupying the mall. A Reciprocal Easement Agreement (REA) between the Macerich Partnership and the anchor tenants provides the parties to the REA with reciprocal easements over the common areas of

their respective properties for the passage of all users of the mall, and the passage and parking of vehicles. The common areas include the parking structures, parking lots, perimeter sidewalks and interior corridors of the mall. The easements also entitle the Macerich Partnership and the anchor tenants to eject individuals from the common areas who are not authorized to be on the property. At all times material, the Macerich Partnership has contracted with Respondent Macerich Property to provide all necessary services for management of Capitola Mall, including the Macerich Partnership's management responsibilities under all leases and occupant agreements, including the REA.

2. The events at Arden Fair Mall in December 1999

In the fall of 1999, Local 586 learned that Wadman Construction, a non-union employer, was building a new Sears store in Roseville, California. Local 586 determined that Wadman Construction was not paying area standards wages and benefits to its carpenter employees on the Roseville jobsite. To publicize its dispute with Wadman Construction's pay practices, Local 586 decided to handbill on December 16, 1999, at existing Sears stores at three shopping centers in the Sacramento, California area. Arden Fair Mall was one of these three shopping malls.

On December 8, 1999, Tom Brodsky, a representative of Local 586, went to the management office

of Arden Fair Mall to investigate the mall's policies regarding the public dissemination of information on mall property. Brodsky spoke with Nora Bailey, in the management office of Respondent Macerich Management. Brodsky asked if there were any forms that he needed to fill out and turn in. Bailey told Brodsky that "people just come in to do their activities." Brodsky also notified the local Sheriff's office of Local 586's plan to distribute handbills at the Sears store in the Arden Fair Mall. The Sheriff, believing that he did not have jurisdiction over the Arden Fair mall, contacted the Sacramento Police department for Brodsky.

On December 16, Brodsky met with the persons who would handbill on behalf of Local 586. He distributed handbills and told the employees to begin handbilling at 9:30 a.m. The handbill was two-sided and read as follows:

[side one]

COME SEE THE DARKER SIDE OF

Substandard wages
No health care for families
Inadequate vocational training
No pension or retirement plans

Sears often uses contractors that pay substandard wages to their workers. Many more do not provide health or pension benefits. In addition, young workers on these projects have no access to any vocational training that would allow them to learn a

skilled trade to advance their career. These construction practices put a real burden on our community. In effect, taxpayers are subsidizing Sears' construction by paying for the health care and social services that these working families need and deserve through government subsidies.

Please don't shop at SEARS unless they stop using
Contractors who abuse working families!
Thank you for your support
Carpenters for a living wage

[side two]

SEARS?
DOES SEARS
GIVE THE GOOD LIFE
AT A GREAT PRICE?

Jon Martino met in the Arden Fair Mall parking lot with four other handbillers. Martino distributed flyers that he had obtained from Brodsky and T-shirts for the employees to wear. The T-shirts bore the same message as the leaflets. Martino and another leafletter stood by the first floor entrance to the Sears store. Martino instructed the other leafletters to handbill at the exterior entrances of the Sears store. Martino wanted to make sure that all the Sears' entrances were covered.

Martino and Shawn McCartney stationed themselves at each of the two sides of the interior mall entrance to Sears and began handing out the handbills. They made sure not to impede the passage

of customers. After only 15 minutes of handbilling two individuals from Sears approached them. These individuals told Martino and McCartney that the two handbillers were trespassing and had to leave. Martin argued that he had a right to be there. The Sears personnel then called Arden Fair Mall security.

Franklin Fisher, an Arden Fair mall guard responded to the call. Fisher requested that the two Local 586 employees leave the mall if they intended to continue their handbilling without complying with the mall's rules for public use of common areas. Fisher then escorted McCartney out of the building to McCartney's car in the parking lot. Martino remained at the entrance to Sears and had no further dealings with Fisher that day.[2]

After hearing of Martino's problems at the mall, Brodsky went to the mall to investigate the mall's rules regarding public access. Brodsky obtained a copy of an application form and a copy of the "Arden Fair Mall Rules for Public Use of Common Areas." Brodsky took the packet with him to Local 586's attorney, Amy Martin. Brodsky, with Martin's help, filled out the application and Brodsky turned the completed application to the mall's service center that afternoon around 3:30 p.m. Brodsky was told that his

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[2] At some point, the Sears representatives and Martino got into a scuffle. Martino was placed under citizen's arrest by the Sacramento police. Unfair labor practice charges against Sears were settled.

application was missing two pages and he was given copies of the missing materials. The service center employee told Brodsky that his application would be denied because of the dates on which Local 586 proposed to handbill. She also told Brodsky that he should expect a response to his application in a couple of days.

Richard Wright, vice president and executive director of the Northern California Carpenters Regional Council, oversees the picketing and organizing activities of all Locals covered by the Northern California Carpenters Regional Council, including Local 586 and Local 505. Wright testified that he had a conversation with an attorney for Respondent Macerich Management, on December 17 (the correct date was December 16) in which the attorney stated that Wright would be lucky if Respondent Macerich Management's review of Local 586's application would be completed or approved "within two months, if at all, and this is how they kept people they didn't want at the mall . . . off their property."

Counsel for Respondents, Thomas Leanse, testified that he had this conversation with Wright on December 16, shortly before noon (before Local 586 filed its application). Leanse denied making such a threat and testified that he merely informed Wright that Local 586 needed to submit an application to leaflet and that the application might not be approved for the balance of the calendar year because of the peak period ban. I credit Leanse's version of this conversation. First, I find it unlikely that Leanse

would say "this is how they kept people they didn't want . . . off their property." Leanse is too careful to make such a statement. Further, having drafted these rules, Leanse was more likely to use the rules in general, and the peak period rule in particular, to deny access.

On December 17, Brodsky returned to the mall's management office to inquire about the status of Local 586's application to handbill at the mall. Brodsky spoke with Carmen Lyttle, mall manager. Lyttle told Brodsky that the mall's attorney would contact Local 586's attorney. Lyttle told Brodsky that his application was missing a copy of the handbill. Brodsky went to his truck and retrieved a copy of the handbill for Lyttle.

On December 22, Local 586 received a letter from Lyttle rejecting Local 586's application to handbill. The letter rejected Local 586's application as untimely, incomplete, and ambiguous, specifically:

> The application was submitted on the same day of the activity rather than four business days in advance and, therefore, was untimely.
>
> The application did not include a legible copy of the handbill.
>
> The application did not specify the three-day period the activities were to take place, but only noted "12-16-99-On."

> The application did not furnish a $50 cleaning deposit or, alternatively, a completed Indemnity Agreement.
>
> The application did not furnish all the names of the participants.
>
> The application was signed by Local 586 Attorney Ami Martin, rather than Brodsky, without any evidence that Martin was the Union's authorized representative.
>
> The application failed to identify Local 586's preferred Designated area where the Union wished to carry out its proposed activities.

The Union did not submit another application after receiving the mall's December 21, rejection letter.

3. The events at Capitola Mall in March and May 2000

In early 2000, Local 505 determined that Construction Developers, Inc., was paying its employees below area standards wages and benefits established by Local 505. Construction Developers was performing construction work at the Capitola Mall for a Gottschalk Expressions store. On March 7, Local 505, decided to set up a picket line at the Expressions store at Capitola Mall.

Edward Van Valkenburgh, a representative for Local 505, was supervising handbilling on March 7, on the mall's exterior sidewalks outside the mall's

entrances and the exterior entrance to the Expressions store. The leaflets read as follows:

[side one]

CAPITOLA MALL'S dirty little secrets!!
While posing as a good community member,
behind the scenes Capitola Mall

Allows contractors without local business licenses to work at the Mall in violation of municipal code and depriving the community of revenue to support general services;

Welcomes out-of-state contractors, contractors who import out-of state workers . . . depriving local residents and the local economy of potential revenue and economic benefits;

Welcomes contractors who undermine area wages and benefits by underpaying workers on projects built at the Mall;

Commits Unfair Labor Practices, in violation of Federal Law to hide the practices of some contractors working at the Mall.

CAPITOLA MALL has the power
to end these practices
But they won't, *unless you help!!*

Please deliver this leaflet to the cashier of your favorite Mall store; Ask them to share your concern with the Mall Management.

Together we can make a difference and Capitola Mall can

Support the community that supports the Mall and its Merchants

We appreciate your support!!
Carpenters L.U. 505

This is not a strike against this establishment. We do not seek any work stoppages or refusal to make deliveries or to handle any goods.

[side two]

The second side had a circle with a slash through it. "Capitola Mall" was written across the slash. The words "Unfair to Labor and the community" were written on the circle's boundaries. The leafletters also wore T-shirts with similar, but a more abbreviated version of the text contained in the leaflets.

At a certain point, Van Valkenburgh left the handbillers to go inside the mall with Richard Wright. Wright had been arrested at the mall on March 2. Wright and Van Valkenburgh entered the mall to check the construction site and to photograph the area where Wright had previously been arrested. Van Valkenburgh noticed that employees of Construction Developers, Inc., were working at the Gottschalk Expressions jobsite and he and Wright decided that Local 505 would picket Construction Developers.

On March 7, Local 505 set up its picket at the interior entrance to the Expressions jobsite. Two Local 505 picketers were walking back and forth

carrying signs along a temporary wall. The corridor was approximately 30-feet wide. There were 10 to 15 feet between the temporary wall and planters in the middle of the corridor. They took precautions not to prevent anyone from entering or leaving the jobsite and not to block customers from using the hallways. Wright and Van Valkenburgh supervised the picketing. The signs read, "Construction Developers, Inc., fails to pay wages and benefits established by carpenters in this area, Local 505."

After a few minutes, four mall security guards appeared and one of them began videotaping the picketing. Shortly thereafter, Mark Letendre, mall manager, approached Van Valkenburgh. Letendre offered Van Valkenburgh a copy of the Capitola Mall Rules for Public Use of Common Area but Van Valkenburg declined to accept the copy because he had previously obtained a copy of the rules. Wright similarly declined a copy of the rules.

Letendre read from a prepared statement that the Local 505 personnel had to leave the property if they wished to continue their activities, that they did not have an approved application on file and that they would be subject to arrest if they did not leave. Wright told Letendre that Local 505's dispute was with Construction Developers and not with the mall or any of its tenants. Wright also stated that under California Penal Code Section 602(n),[3] Local 505 had

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[3] Cal. Penal Code section 602(n) states:

(Continued on following page)

a right to be in the mall. Wright asked if there were any other entrances to the Expressions jobsite and Letendre answered that there were more entrances around the back of the building.

Wright and Van Valkenburgh then set up pickets at the other entrances to the Expressions jobsite. Van Valkenburgh went to the leafletters and told them to stop handbilling and to take off their T-shirts. He then prepared additional pickets signs. Local 505 then placed pickets at the four doorways to the jobsite. These pickets placed at exterior entrances were careful not to block any doorway or to prevent any vehicles from entering or exiting.

Except as provided in sec. 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

> (n) Refusing or failing to leave land real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a police officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the police officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession. . . . However, this subdivision shall not be applicable to persons engaged in lawful labor union activities that are permitted to be carried out on the property by the California Agricultural Labor Relations Act . . . or by the National Labor Relations Act . . . this subdivision shall not apply to persons on the premises who are engaged in activities protected by the California or United States Constitutions.

Shortly thereafter, the police arrived where the two pickets were picketing at the interior entrance to Expressions. The police officer informed Wright and Van Valkenburgh that if the pickets did not leave, they would be subject to citizen's arrest by Jose Murillo, a security guard. The union representatives left the premises and were not arrested.

On March 21, Wright and Van Valkenburgh decided to picket Construction Developers at the Expressions jobsite at Capitola Mall. This time Local 505 had in excess of 20 individuals picketing at the same five locations. There were four pickets assigned to the interior entrance to the expressions jobsite.

These pickets walked along the temporary wall leaving as much space as possible in the corridor. They used the same sign language as on March 7.

After picketing for approximately 15 minutes, Wright was approached by Letendre. Letendre read from a prepared statement stating that Wright had to remove his leaflets and placards, that the mall did not have an approved application from Local 505 on file, and that if Wright did not leave immediately, he would be subject to arrest.[4] Wright responded that he had a right to be there under California Penal Code Section 602 (n) and that he was going to stay. Murillo,

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[4] Letendre testified that Wright was acting in an aggressive manner and that Wright was very agitated. I do not credit this testimony. The videotape of this incident does not corroborate Letendre's testimony.

the security guard, asked Wright to leave and when Wright refused, a police officer placed Wright under citizen's arrest. Wright was booked and taken to jail. The three other picketers also refused to leave and were arrested and taken to jail.

On May 3, 2000, Local 505 again decided to picket a construction employer working at the Capitola Mall. This time Local 505 sought to publicize Hardcastle Construction's failure to pay area standard wages and benefits at its Software Etc., jobsite at the Capitola Mall. The picket signs read, "Hardcastle Construction, Inc., fails to pay wages and benefits established by carpenters in this area, Local Union 505." The four picketers were located outside the only entrance to the jobsite, which was located in the interior of the mall.

About an hour after the picketing began, the pickets were approached by Letendre and mall security. Letendre read from a prepared statement and told the pickets that the mall did not have an approved application from Local 505 on file and that they had to leave the property and remove their placards or they would be subject to arrest. Wright informed Letendre that the pickets were not leaving. The four representatives continued to picket until the police arrived and arrested them.

It is undisputed that Wright intentionally did not make an application to leaflet or picket for the conduct at issue on March 7 and 21 or May 3, 2000. Wright testified that if he followed Respondent

Macerich Property's rules, he would have violated the Board's *Moore Dry Dock*[5] rules and thereby violated Section 8(b)(4)(B) of the Act.

4. The rules at issue

At relevant times Respondents have maintained and applied time, place, and manner rules (rules) designed for application to all persons who wish to engage in expressive activity at the Arden Fair Mall and Capitola Mall. Since the rules were formulated, the malls have always required individuals and groups seeking to handbill at the malls to comply with the applicable rules. The rules require that persons seeking to engage in expressive activity must first complete and submit an application for access for noncommercial expressive activities on a form provided by Respondents.

The rules are applicable to expressive activity other than activities sponsored by the mall or its tenants as well as "activity otherwise expressly allowed on Center Property by the National Labor

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[5] *Sailors' Union (Moore Dry Dock)*, 92 NLRB 547 (1950). Picketing at a common situs is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Relations Act or state labor laws." The rules contain the following pertinent restrictions:

II. DEFINITIONS

C. *Approved Activity*

Actions will not be approved:

6. Activities which identify the Center owner, manager, or any tenant in the Center.

. . . .

F. *Designated Areas* "Designated Area(s) are those area(s) identified in Exhibit A to the Rules. . . . Approved Activities may only be conducted within Designated Areas. [Exhibit A depicts two Designated Areas located in the interior of the mall.]

III. *Application Process and Procedures*

. . . .

B. Attachment to Application Applications must be accompanied by legible copies of any and all items intended to be used, including but not limited to any audio-visual materials, and the text, artwork and pictures on any petitions, literature, leaflets signs and displays.

IV. *Permitted Locations (Designated Areas)*

F. *Designated Areas*

Designated Area(s) are those area(s) identified in Exhibit A to the Rules . . .

Approved Activities may only be conducted within Designated Areas.

. . . .

X. *Peak Traffic Days* [only challenged as applied to exterior areas of the malls]

The Center's management has designated certain days during each calendar year as "peak traffic days" when all Non-Commercial Expressive Activity is prohibited. Application for those days will not be approved.

A list of peak traffic days is attached to these Rules as Exhibit B. The management reserves the right to amend this list. All Peak Traffic Days will be designated at least thirty (30) days in advance of the next new Peak Traffic Day. [Exhibit B contains a list of dates when all non-commercial expressive activity is prohibited. These dates coincide with traditional holidays and sales days.]

. . . .

XII. *Signage and Written Material*

B. Signs, posters, placards, displays or written materials may not interfere with the commercial purpose of the Center or its tenants.

. . . .

E. Participants may not carry or wear any signs, posters or placards.

Under the rules, persons desiring to engage in expressive activities must submit a written application more than four days but less than 20 days before the proposed activity. All materials to be used during the proposed activity must be attached to the application. The Rules restrict usage of the mall property to 6 days per application and preclude any activities during 30 days that the mall designates as "peak traffic days." In addition to the rules related to expressive activity, the center has also maintained a code of conduct applicable to persons entering the center property. Public notice of the code of conduct is provided by means of signs posted at all entrances to the Mall's parking lots that read as follows:

> [Mall} HAS ESTABLISHED A CODE OF CONDUCT FOR VISITORS OF THIS PROPERTY. FAILURE TO FOLLOW THAT CODE MAY RESULT IN EXCLUSION FROM USE OF THIS FACILITY AND/OR ARREST FOR CRIMINAL CONDUCT. THE CODE IS AVAILABLE AT THE CONCIERGE DESK.
>
> PRIVATE PROPERTY. SOLICITATION OR DISTRIBUTION OF HANDBILLS IS STRICTLY PROHIBITED – SEC. SAMC 16.3 16.4."

The Code of Conduct establishes rules of decorum applicable to all Mall visitors. Among other things, the Code prohibits fighting; defacing or destroying Mall property; running, skating, skateboarding and bicycling; littering; soliciting money or donations

"except with the prior written permission" of the mall management; tampering with the mall equipment; and engaging in unlawful or criminal conduct. The code also provides for minimum standards of attire and establishes a policy of progressive exclusion penalties for violations of the Code.

The Rules state that some of the rules may not apply to certain labor activities. The introduction to the rules states:

> Some of the Rules may not apply to persons attempting to organize employees of persons or businesses engaged in work at the center who have a labor dispute with the employer. Some of the Rules also may not apply to employees of persons or businesses engaged in work at the Center. Nevertheless, all persons asking to use the Center's common areas for other than Center-sponsored or tenant sponsored activity must submit an application.

The malls have "Internal Policies and Guidelines for Public Use of Common Area" which are standardized internal policies used by the malls to implement the Rules. The Internal Policies are confidential and not made available to the public, including labor unions seeking to engage in activities at the malls. The Internal Policies define "labor activities" as:

> Employees of persons or businesses engaged in work at the Center who has a "labor dispute" with their employer may not be

> required to comply with certain Center rules, including rules limiting the location and subject matter of the planned communication. Individuals or labor unions who are attempting to organize employees of persons or businesses engaged in work at the Center also may not be required to comply with certain Center rules. For purposes of these Guidelines, the term "labor dispute" means any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

The rules do not specify which rules are inapplicable to "labor disputes." However, the internal policies state that certain labor disputes may not be confined to the malls' designated areas and that the rules limiting the subject matter of the communication may not apply to certain labor disputes. The Internal Policies further state, "If the Center's owner, a Center tenant, or someone else working at the center is involved in a labor dispute, then the National Labor Relations act or California labor law may require that special arrangements be made to accommodate that particular activity." The Internal Policies further state:

> Unless the proposed activity is a labor dispute, as defined in these Guidelines, you may not approve an application for an activity that targets and/or identifies by name the Center's owner or manager, or a

> tenant in the Center. For example, you may not approve a non-labor related application for an activity which seeks to encourage patrons to "Boycott Bullocks," but you may not reject an application that is labor-related and meets the criteria set forth under "Labor Activities" herein.

The Internal Policies require the mall management to immediately forward to Respondents' legal counsel any applications which are "submitted by employees of persons or businesses engaged in work at the Center and [relate] to a labor dispute" with their employer, or if an application indicates the applicant's purpose is to organize persons working at the Center."

At the hearing, Respondents gave no explanation as to which, if any, of the other Rules were not applicable to "labor activities."

Arden Fair Mall's designated areas are two areas located inside of the mall building on the ground floor, each in a separate corridor leading from back entrances into the building. None of the exterior entrances to the mall is included as a designated area. The alleged purpose of the designated areas is for traffic flow and safety issues. The Capitola Mall also has two designated areas inside the mall building. One area is an interior courtyard and the other area is outside the Food Court.

Respondents' Rules provide for a complete ban on all noncommercial activity during peak traffic days.

The Internal Guidelines define "peak traffic days" to be the 30 busiest days of the year. Arden Fairs' peak traffic days for 1999, were from November 26 through 28 and December 4 through December 31. Capitola Mall's peak traffic days for 1999 were April 2 through 3, November 26 through November 28, December 4 through December 27, and December 30 to December 31. The days shown for 2000 are April 21 through April 22, November 25 through 26, and December 2 through 27.

5. Conclusions

As the Board recently stated in *Glendale Associates, Ltd.*, 335 NLRB 27 (2001):

> In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the United States Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property (unless the employees are inaccessible through usual channels). In the absence of a private property interest, however, the Court's holding in Lechmere is not controlling. See *Bristol Farms*, 311 NLRB 437, 438, fn. 6 (1993) ("employer's exclusion of union representatives from private property to which the employer lacks a property right entitling it to exclude individuals likewise violates Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities"). See also *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999).

> The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. *Bristol Farms*, 311 NLRB at 438. The Board does so because it is State law, not the Act, that creates and defines the employer's property interest. Thus, an employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 at 638; *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

The California Supreme Court held in *Robins v. Pruneyard Shopping Center,* 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), that the free speech and petition provisions of the California State Constitution protects the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner.[6]

In *Pruneyard,* the California Supreme Court endorsed the right to implement time, place, and manner rules to assure that the activities at issue "do not interfere with normal business operations [and] would not markedly dilute [the owner's] property rights." The United States Supreme Court also

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[6] The United States Supreme Court, *in Pruneyard Shopping Center v. Robbins,* 447 U.S. 74 (1980), upheld California's right under its State Constitution to restrict the property rights of shopping center owners.

endorsed time, place and manner restrictions under the First Amendment "provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In *Glendale Associates,* supra, the charging party-union handbilled near the Disney Store at the Glendale Galleria retail shopping center in Glendale, California. After commencing handbilling, union officials were informed of the rules regulating handbilling and were given an application and a packet of materials explaining what was necessary for compliance. The union submitted an application that contained several deficiencies including the failure to furnish to the respondents the names of those expected to participate and the failure to remove reference to the "Disney Store" on the handbills. The union complied with the former request but declined to remove reference to the "Disney Store" from the handbills.

Relying on *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), the Board stated that California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner. It found that the removal of the reference to the "Disney Store" on the handbills appeared to be essentially a content-based restriction and not a "time,

place and manner" restriction permitted under State law. The Board found the respondents' rule requiring advance identification of handbillers by name did not violate Section 8(a)(1). In contrast to the content-based rule prohibiting identification of a tenant on the handbill, the rule requiring advance notice of prospective handbillers was found to be consistent with legitimate time, place, and manner purposes under State law. Under California law, the rule allows identification of persons who may previously have caused injury or damage to the shopping center and facilitates verification, for liability purposes, of the identity of those authorized on the handbill.

B. The Union's Labor Dispute and its Handbilling

At the relevant times, Local 505 had a primary labor dispute within the meaning of Section 2(9) of the Act with Construction Developers, Inc., because Local 505 believed that Construction Developers failed to pay area standards wages to its employees. Similarly, Local 505 had a primary labor dispute with Hardcastle Construction, Inc., because Local 505 believed that Hardcastle failed to pay area standards wages to its employees Peaceful area standards picketing is considered primary picketing protected by the Act. *Makro, Inc.*, 305 NLRB 663 (1991); *Mega Van & Storage*, 294 NLRB 975, 977 (1989). Local 505 had no primary labor dispute with Respondent Macerich Property, Gottschalk Expressions, Software Etc., or any mall tenant.

Local 586 had no primary labor dispute with the Respondent Macerich Management or any of the mall tenants. However, in December 1999, the Union peacefully distributed handbills at the Arden Fair Mall because Sears used Wadman Construction, which paid substandard wages, for construction at a Sears store. The handbilling, which mentioned Sears but did not mention Wadman Construction, was directed at getting information relating to the substandard wages to consumers and the general public.

Generally, peaceful area standards handbilling enjoys protection under Section 7 of the Act. *Leslie Homes*, 316 NLRB 123 (1995). Similarly, publicity other than picketing, such as handbill appeals, by a labor organization for consumers to boycott a secondary employer that utilizes a substandard construction subcontractor does not run afoul of the secondary boycott proscriptions in Section 8(b)(4) of the Act. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988) (*DeBartolo II*). Since *DeBartolo II*, the Board has held that secondary handbilling addressed to consumers or the public is unregulated by Section 8(b)(4) when it is unaccompanied by picketing or other unlawful conduct. *Plumbers & Pipefitters Local 32 (Ramada, Inc.)*, 302 NLRB 919 (1991). Here, the Union had an ongoing area standards dispute with Wadman and the handbills it distributed at Arden Fair Mall called for a boycott of Sears products because that retailer utilized Wadman's construction services. Based on

these principles, I find that Local 586's handbilling was protected by the Act.

California's *Pruneyard* doctrine, which is based on the free speech provisions of the California State constitution, treats private shopping centers and comparable properties open to the public as "public forums," where expressive activities are protected. *Robins v. Pruneyard,* 151 Cal. Rptr. 854 (1979), affd. 447 U.S. 74 (1980). The recognition of California's constitutional right to free speech in privately owned shopping centers was recently affirmed in *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 111 Cal. Rptr. 2d 336, 337 (2001).

In *Pruneyard,* the Supreme Court held that the State of California was permitted to provide greater constitutional protection for speech than provided by the United States constitution. Under California's broader constitutional guarantee, the court found that a shopping center did not have a right to expel high school students soliciting signatures for a petition in its privately owned central courtyard. In defining the breadth of the state constitutional speech protection, the *Pruneyard* court relied on *Schwartz-Torrance v. Bakery & Con. Workers Union*, 40 Cal. Rptr. 2333 (1964), cert. denied 380 U.S. 906 (1986), and In *re Lane*, 79 Cal Rptr. 729 (1969), cases involving the First Amendment rights of union pickets/handbillers outside business establishments, as testifying to the "strength of 'liberty of speech' in the state." In *Schwartz-Torrance,* the California Supreme Court prohibited the owner of a strip-shopping

mall from preventing union organizers from picketing in front of a bakery in the mall. Under the court's balancing test, the union's substantial free speech rights, in the context of State labor relations law, out weighed the owner's property rights "worn thin by public usage." *Schwartz-Torrance,* 40 Cal Rptr. at 2338. *In re Lane,* the California Supreme court enjoined the owner of a large, freestanding supermarket from excluding from the sidewalk in front of the store individuals peacefully handbilling concerning a labor dispute. The court held that "when a business establishment invites the public generally to patronize its store and in so to traverse a sidewalk opened for access by the public," the private ownership of the sidewalk does not prevent the exercise of constitutional privileges at or near the establishment's entrance. 79 Cal. Rptr. at 733.

California's Moscone Act prohibits courts from enjoining peaceful picketing or publicizing of a labor dispute at "any place where any person or persons may lawfully be" which does not involve fraud, violence or breach of the peace." Cal. Code of Civ. Proc. Section 527.3. In *Sears v. San Diego District Council of Carpenters*, 158 Cal Rptr. 370 (1979), the California Supreme Court held that the Moscone Act prohibited the ejection of picketers protesting Sears' refusal to adhere to a master carpentry agreement from the private sidewalk surrounding the Sears store. In doing so, the court found that independent of any constitutional right, the State of California could by statute or judicial decision permit activity on

private property as a matter of State labor law. The Court noted *Robins v. Pruneyard*, which had previously been decided, and stated:

> The *Robins* decision rests on the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure Section; accordingly we express no opinion on whether the California Constitution protects the picketing here at issue.

The California Supreme Court also interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California Decisions, including *Schwartz-Torrance* and *In re Lane*. Additionally, the court found that labor activity protected by the Moscone Act to be considered "legal" for purposes of construing the labor activity exemption in California's trespass statutes. California's trespass statutes exempt "lawful" union activity from the definition of criminal trespass 158 Cal Rptr. at 380 fn. 9. See also *In re Catalano*, 171 Cal. Rptr. 667, 670 fn. 4 (1981) (union representatives could not be convicted of violating trespass laws for entering jobsite to investigate the safety of working conditions; statute exempts lawful union activity, as well as activities for the purpose of engaging in any organization effort).

Recently, the California Legislature passed California Labor Code Sections 1138, et seq. (effective January 2000) that specifies the procedural process through which a preliminary injunction is obtained. Although Section 1138 adds new procedural hurdles

to obtaining preliminary injunctions, the legislation adopts the same definition of "labor dispute" found in the Moscone Act. As a result, the new statute does not change the relevant analysis.

> a. The rules (1) ban activities that identify by name the mall owner, manager, or any tenant in the mall: (2) ban signage and written materials that interfere with the "Commercial Purpose" of the mall; (3) ban the carrying or wearing of signs; and (4) require the Pre-submission of written materials

In *Glendale Associates*, 335 NLRB 27 (2001), the Board found that the Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing a rule that prohibited union handbillers from identifying by name any tenant at the Respondents' facility. Relying on *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Board stated that California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner. It found that the prohibition of a reference to the tenant on the handbills was essentially a content-based restriction and not a "time, place and manner" restriction permitted under California State law.

Based on *Glendale Associates*, it appears that the ban on activities that identify by name the mall owner, manager, or any tenant in the mall; the ban of signage and written materials that interfere with the "commercial purpose" of the mall; and the

requirement of the pre-submission of written materials, are content based restrictions and not "time, place and manner" restrictions permissible under California State law.

The rules ban the carrying or wearing of signs. The purpose of this rule is to prevent interference with the commercial purposes of the mall, i.e., to sell goods and services. Respondents do not want material on signs or apparel that would negatively impact on stores in the malls. I find that the reasonable consequence of the rule is to restrict a union's ability to protest the action of an employer present at the mall, with whom the union has a primary dispute. To that extent, I find that the rule is a content-based restriction prohibited under *Glendale Associates*. The rule does not seek reasonable time, place and manner restrictions on carrying or wearing signs but simply bans such materials completely.

b. The rules completely ban access to the exterior area of the malls and apply the peak traffic ban to the mall's exterior areas

The rules state that noncommercial expressive activity may be conducted only in designated areas and "are not allowed in any other location, including driveways and parking lots." The designated areas are all located in the interior common areas. Thus, the rules impose a ban on the exterior areas of the two malls.

The purposes of limiting activity to the designated areas is (1) to allow enough space on each side of an area to allow "easy traffic flow" and (2) to comply with local fire codes requiring from eight to ten feet clearances between an activity and entrances. The explanation for excluding sidewalks from the designated areas was that the sidewalks were not wide enough. In *Bristol Farms,* 311 NLRB 437, 439 (1993), the Board found that an employer violated Section 8(a)(1) of the Act by excluding nonemployees, who were engaged in peaceful leafleting and picketing, on the exterior sidewalk of a grocery store located in a California shopping mall. The Board citing *Pruneyard* held that the shopping center did not have a property interest sufficient to exclude expressive activity entirely from its exterior property. In *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), the Board cited *Pruneyard* as the basis for finding that the owner of a freestanding grocery store could not exclude peaceful union picketing and handbilling from the store's surrounding private sidewalk and parking lots. The Board citing *Sears,* 158 Cal. Rptr. 370, 378 stated:

> The sidewalk outside a retail store has become the traditional accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store . . . In such context, the location of the store whether it is on the main street of the downtown section . . . in a

> suburban shopping center or in a parking lot, does not make any difference.

Indio Grocery Outlet, 323 NLRB at 1142, quoting *Sears,* 158 Cal. Rptr. 370, 378. Thus, I find that Respondent did not have a sufficient property interest to ban peaceful picketing and handbilling from the exterior areas. Similarly, to the extent that the ban on activity on peak traffic days applies to the exterior areas, Respondent does not have a sufficient property interest to ban such activities.

c. The Interference with union activities at the malls

As stated above, Local 586 was engaged in peaceful area standards handbilling at Arden Fair Mall. *Edward J. DeBartolo Corp. v. Florida Building Trades Council,* 485 U.S. 568 (1988). However, Local 586 had not applied for a permit to engage in noncommercial expressive activity. I find that the absence of a permit was excused by the action of Respondent Arden Fair's conduct in informing Brodsky that there were no forms to fill out and "people just come in and do their activities." Thus, I find that Arden Fair's interference with Local 586's lawful handbilling on December 16, 1999, violated Section 7 of the Act under *Pruneyard* and *Glendale Associates.*

On March 7, 2000, Local 505 picketed at Capitola Mall without applying for a permit to engage in noncommercial expressive activity. The picketing was

stopped because the Union did not have an approved application on file. Local 505 then picketed at four exterior entrances to the store site at which they had a primary dispute with Construction Developers, Inc. Respondent Macerich Property threatened the pickets at the interior entrance to the store with arrest. There is no evidence that the pickets at the exterior entrances were threatened with arrest. Accordingly, I find that since the pickets inside the mall did not have an approved application under reasonable time, place and manner rules they could be prevented from picketing inside the mall.

On March 21, 2000, Local 505 again sought to picket Construction Developers at the mall site. Local 505 picketed both inside and outside the mall. Again Respondent's officials approached the union officials and stated that Local 505 did not have an approved application on file. The picketers inside the mall were forced to leave and three pickets were arrested. There is no evidence that the pickets outside the mall were interfered with.

On May 3, Local 505 again sought to picket inside the mall. Local 505 picketed Hardcastle Construction at the entrance to the Software Etc. store while Hardcastle Construction was working at that store. Again Respondent Macerich Property's officials told the union officials that the pickets had to leave. The pickets did not leave and eventually were arrested. Local 505 did not attempt to comply with the time, place and manner policies and thus, cannot claim interference with its rights.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By prohibiting union agents from engaging in the peaceful distribution of consumer boycott handbills at the Arden Fair Mall on December 16, 1999, Respondent Macerich Management engaged in an unfair labor practice within the meaning of Section 8(a)(1).

4. Respondents engaged in unfair labor practices in violation of Section 8(a)(1) by promulgating, maintaining, and enforcing rules restricting the content of lawful picket signs, or handbilling, or written materials at the Arden Fair Mall and Capitola Mall.

5. Respondents engaged in unfair labor practices in violation of Section 8(a)(1) by promulgating, maintaining, and enforcing rules restricting lawful picketing or handbilling at the exterior areas at the Arden Fair Mall and Capitola Mall.

6. Respondents' unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondents did not otherwise violate Section 8(a)(1) as alleged in the consolidated complaint.

REMEDY

Having found that the Respondents have engaged in a certain unfair labor practice, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents will be required to post the attached notices in places at the Arden Fair Mall and Capitola Mall where notices to employees are normally posted. However, in order to assure that the employees whose rights would be vindicated by this decision will have a greater opportunity to receive information about the disposition of this matter, my recommended Order will require that Respondents also provide the Unions with signed and dated copies of the attached notices for posting by the Unions if they so choose.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Macerich Management Company, its officers, agents, successors, and assigns, shall

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

a. Preventing United Brotherhood of Carpenters and United Brotherhood of Carpenters and Joiners, Local Union 586, United Brotherhood of Carpenters and Joiners of America, AFL-CIO from distributing consumer boycott handbills at the Arden Fair in Sacramento, California, as long as Local 586 has taken all reasonable steps to comply with Respondent's lawful time, place, and manner restrictions on noncommercial expressive activity.

b. Promulgating, maintaining or enforcing any rule restricting the content of lawful picket signs, or handbilling, or written materials at the Arden Fair Mall.

c. Promulgating, maintaining, or enforcing any rule restricting lawful picketing or handbilling at the exterior areas at the Arden Fair Mall.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Delete and expunge from its rules for non-commercial use of common areas, from its policies and guidelines for non-commercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule

restricting the content of lawful handbilling or picketing at the Mall.

b. Delete and expunge from its rules for nonommercial use of common areas, from its policies and guidelines for non-commercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Arden Fair Mall.

c. Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of the Arden Fair Mall in Sacramento, California, copies of the attached notice marked "Appendix A."[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1999.

d. Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The Respondent, Macerich Property Management Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Promulgating, maintaining or enforcing any rule restricting the content of lawful picket signs, or handbilling, or written materials at the Capitola Mall.

b. Promulgating, maintaining, or enforcing any rule restricting lawful picketing or handbilling at the exterior areas at the Capitola Mall.

c. In any like or related manner interfering with, restraining, or coercing employees in the

exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Delete and expunge from its rules for noncommercial use of common areas, from its policies and guidelines for non-commercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting the content of lawful handbilling or picketing at the Mall.

b. Delete and expunge from its rules for noncommercial use of common areas, from its policies and guidelines for non-commercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Capitola Mall.

c. Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of the Capitola Mall in Capitola, California, copies of the attached notice marked "Appendix B."[9] Copies of the notice, on forms provided

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted, Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2000.

d. Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found. Dated, San Francisco, California, December 26, 2001.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit United Brotherhood of Carpenters and Joiners, Local Union 586, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union), from lawful handbilling or leafleting as long as Local 586 takes steps to comply with our lawful time, place, and manner policies for non-commercial, expressive activities.

WE WILL NOT promulgate, maintain or enforce any rule restricting the content of lawful picket signs, or handbilling, or written materials at the Arden Fair Mall.

WE WILL NOT promulgate, maintain, or enforce any rule restricting lawful picketing or handbilling at the exterior areas at the Arden Fair Mall.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Nation Labor Relations Act.

WE WILL delete and expunge from our rules for non-commercial use of common areas, from its policies and guidelines for noncommercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule restricting the content of lawful handbilling or picketing at the Mall.

WE WILL delete and expunge from our rules for non-commercial use of common areas, from our policies and guidelines for noncommercial use of common area of Arden Fair Mall and from any other document within the custody and control of Arden Fair Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Arden Fair Mall.

MACERICH MANAGEMENT COMPANY

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Nation Labor Relations Act.

WE WILL delete and expunge from our rules for non-commercial use of common areas, from its policies and guidelines for noncommercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting the content of lawful handbilling or picketing at the Mall.

WE WILL delete and expunge from our rules for non-commercial use of common areas, from our policies and guidelines for non-commercial use of common area of Capitola Mall and from any other document within the custody and control of Capitola Mall where such rules may be contained, any rule restricting lawful handbilling or picketing at the exterior areas of the Capitola Mall.

MACERICH PROPERTY MANAGEMENT COMPANY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINDERS OF AMERICA LOCAL 848; et al., Petitioners, – UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Intervenor, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 05-75295 NLRB Nos. 20-CA-29636-1 20-CA-29918-1 Northern District of California, San Francisco ORDER (Filed Dec. 28, 2007)
NATIONAL LABOR RELATIONS BOARD, Petitioners, – UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Intervenor, v. MACERICH MANAGEMENT COMPANY; et al., Respondents.	No. 05-76217 NLRB Nos. 20-CA-29636-1 30-CA-29918 Northern District of California, San Francisco

MACERICH MANAGEMENT COMPANY AND MACERICH PROPERTY MANAGEMENT COMPANY,,

Petitioner,

– UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 05-77116

NLRB Nos.
20-CA-29636-1
20-CA-29918-1
Northern District of California, San Francisco

Before: ROTH,* THOMAS, and CALLAHAN, Circuit Judges.

The parties are directed to submit simultaneous supplemental briefs on the impact on this appeal of the opinion issued by the California Supreme Court in *Fashion Valley Mall v. NLRB*, ___ Cal.3d ___, 2007 WL 4472241 (Cal. Dec. 24, 2007), The briefs should not contain more than 7,000 words and should be filed on or before January 28, 2008. Submission of this case will remain deferred until further order of the Court.

* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINDERS OF AMERICA LOCAL 848; et al., Petitioners, – UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Intervenor, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 05-75295 NLRB Nos. 20-CA-29636-1 20-CA-29918-1 Northern District of California, San Francisco ORDER (Filed Oct. 15, 2007)
NATIONAL LABOR RELATIONS BOARD; et al., Petitioners, – UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Intervenor, v. MACERICH MANAGEMENT COMPANY; et al., Respondents.	No. 05-76217 NLRB Nos. 20-CA-29636-1 30-CA-29918 Northern District of California, San Francisco

MACERICH MANAGEMENT COMPANY AND MACERICH PROPERTY MANAGEMENT COMPANY,,

Petitioner,

– UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 05-77116

NLRB Nos.
20-CA-29636-1
20-CA-29918-1
Northern District of California, San Francisco

Before: ROTH,* THOMAS, and CALLAHAN, Circuit Judges.

Submission is deferred in the captioned petitions for review pending further order of this Court, to be issued after filing of an opinion by the California Supreme Court in *Fashion Valley Mall v. NLRB,* no. S144753.

* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 05-75295 NLRB Nos. 20-CA-29636-1 20-CA-29918-1
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505, Intervenors, v. MACERICH MANAGEMENT, COMPANY; MACERICH PROPERTY MANAGEMENT COMPANY, Respondents.	No. 05-76217 NLRB Nos. 20-CA-29636-1 30-CA-29918 ORDER (Filed May 26, 2009)

MACERICH MANAGEMENT COMPANY; MACERICH PROPERTY MANAGEMENT COMPANY, Petitioners, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505, Intervenors, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 05-77116 NLRB Nos. 20-CA-29636-1 30-CA-29918
INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND CALIFORNIA BUSINESS PROPERTIES ASSOCIATION; CALIFORNIA LABOR FEDERATION, Amicus Curiae	

Before: ROTH,* THOMAS, and CALLAHAN, Circuit Judges.

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* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1. The National Labor Relations Board's ("Board") motion to recall the mandate in case no. 05-75295 is GRANTED.

2. The motion of Macerich Management Company and Macerich Property Management Company ("Macerich") to intervene in case no. 05-75295 is GRANTED.

3. The Board's motion, pursuant to Fed. R. App. P. 19, to issue a judgment of enforcement conforming to the opinion issued in the case is GRANTED. The Clerk of Court is directed to file the judgment of enforcement as proposed by the Board in its motion. After filing the judgment of enforcement, the Clerk of Court shall re-issue the mandate in case no. 05-75295 forthwith.

4. Judges Roth and Thomas have voted to deny Macerich's petition for rehearing. Judge Callahan has voted to grant the petition for rehearing. Judge Thomas voted to reject the petition for rehearing en banc and Judge Roth so recommended. Judge Callahan voted to grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

Macerich's petition for rehearing and rehearing en banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 05-75295 NLRB Nos. 20-CA-29636-1 20-CA-29918-1
NATIONAL LABOR RELATIONS BOARD, Petitioner/ Cross-Respondent, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505, Intervenors, MACERICH MANAGEMENT COMPANY;	Nos. 05-76217 05-77116 NLRB Nos. 20-CA-29636-1 20-CA-29918-1

MACERICH PROPERTY MANAGEMENT COMPANY,
Respondents/ Cross-Petitioners.

JUDGMENT

(Filed Jun. 2, 2009)

Before: Jane R. Roth, Sidney R. Thomas and Consuelo M. Callahan, Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by the United Brotherhood of Carpenters and Joiners of America, Locals 505 and 586, and a petition filed by Macerich Management Company and Macerich Property Management Company, to review an August 27, 2005 Order of the National Labor Relations Board in Board Case Nos. 20-CA-29636-1 and 20-CA-29918-1, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of the parties and has considered the briefs and transcript of record filed in this cause. On August 25, 2008, the Court being fully advised in the premises, handed down its opinion granting the Unions' petition, granting in part the Board's petition and denying Macerich's petition. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that

A. The Respondent, Macerich Management Company, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule banning activities that identify by name the Arden Fair Mall owner, manager, or tenants.

(b) Maintaining and enforcing a rule that bans signage and written materials that "interfere with the commercial purpose" of the Arden Fair Mall.

(c) Maintaining and enforcing a rule that requires the presubmission of written materials for the purpose of enforcing the rules cited in paragraphs 1(a) and (b), above.

(d) Maintaining and enforcing a rule banning the carrying or wearing of signs at Arden Fair Mall.

(e) Maintaining and enforcing a rule excluding exterior areas, including mall sidewalks, from designated areas where expressive activities may occur at Arden Fair Mall.

(f) Maintaining and enforcing a rule prohibiting expressive activities during "peak traffic days" at Arden Fair Mall.

(g) Interfering with handbilling or picketing at Arden Fair Mall by maintaining an unlawful application policy.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules indicated in paragraphs 1(a) through (f) above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Arden Fair Mall, and from any other document within the custody and control of Macerich Management Company wherever such rules may be contained.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of Arden Fair Mall in Sacramento, California, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to the public are customarily posted. Reasonable steps shall be

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1999.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Macerich Property Management Company, Capitola, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule banning activities that identify by name the Capitola Mall owner, manager, or tenants.

(b) Maintaining and enforcing a rule that bans signage and written materials that "interfere with the commercial purpose" of the Capitola Mall.

(c) Maintaining and enforcing a rule that requires the presubmission of written materials for the purpose of enforcing the rules cited in paragraphs 1(a) and (b), above.

(d) Maintaining and enforcing a rule banning the carrying or wearing of signs at Capitola Mall.

(e) Maintaining and enforcing a rule excluding exterior areas, including mall sidewalks, from designated areas where expressive activities may occur at Capitola Mall.

(f) Maintaining and enforcing a rule prohibiting expressive activities during "peak traffic days" at Capitola Mall.

(g) Interfering with handbilling or picketing at Capitola Mall by maintaining an unlawful application policy, by threatening to cause the arrest of, and by causing the arrest of individuals affiliated with Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Rescind the rules indicated in paragraphs 1(a) through (f) above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Capitola Mall, and from any other document within the custody and control of Macerich Property Management Company wherever such rules may be contained.

   (b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of Capitola Mall in Capitola, California, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to the public are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at

its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2000.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT maintain and enforce a rule banning activities that identify by name the Arden Fair Mall owner, manager, or tenants.

WE WILL NOT maintain and enforce a rule that bans signage and written materials that "interfere with the commercial purpose" of Arden Fair Mall.

WE WILL NOT maintain and enforce a rule that requires the presubmission of written materials for the purpose of enforcing the two rules cited above.

WE WILL NOT maintain and enforce a rule banning the carrying or wearing of signs at Arden Fair Mall.

WE WILL NOT maintain and enforce a rule excluding exterior areas, including mall sidewalks, from designated areas where expressive activities may occur at Arden Fair Mall.

WE WILL NOT maintain and enforce a rule prohibiting expressive activities during "peak traffic days" at Arden Fair Mall.

WE WILL NOT interfere with handbilling or picketing at Arden Fair Mall by maintaining an unlawful application policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rules indicated above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Arden Fair Mall, and from any other document within our custody and control wherever such rules may be contained.

MACERICH MANAGEMENT CO.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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WE WILL NOT maintain and enforce a rule that bans activities that identify by name the Capitola Mall owner, manager, or tenants.

WE WILL NOT maintain and enforce a rule that bans signage and written materials that "interfere with the commercial purpose" of Capitola Mall.

WE WILL NOT maintain and enforce a rule that requires the pre-submission of written materials for the purpose of enforcing the two rules cited above.

WE WILL NOT maintain and enforce a rule banning the carrying or wearing of signs in Capitola Mall.

WE WILL NOT maintain and enforce a rule excluding exterior areas, including mall sidewalks, from designated areas where expressive activities may occur at Capitola Mall.

WE WILL NOT maintain and enforce a rule prohibiting expressive activities during "peak traffic days" at Capitola Mall.

WE WILL NOT interfere with handbilling or picketing at Capitola Mall by maintaining an unlawful application policy, by threatening to cause the arrest of, and by causing the arrest of individuals affiliated with Carpenters Local 505, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rules indicated above, and remove the language from the rules for noncommercial use of common areas, from the policies and guidelines for noncommercial use of common areas of Capitola Mall, and from any other document within our custody and control wherever such rules may be contained.

MACERICH PROPERTY MANAGEMENT CO.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 05-75295 NLRB Nos. 20-CA-29636-1 20-CA-29918-1

NATIONAL LABOR RELATIONS BOARD,	:	Nos. 05-76217 05-77116
Petitioner/ Cross-Respondent,	:	NLRB Nos. 20-CA-29636-1 20-CA-29918-1
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505,	:	
Intervenors,	:	
v.	:	
MACERICH MANAGEMENT COMPANY; MACERICH PROPERTY MANAGEMENT COMPANY,	:	
Respondents/ Cross-Petitioners.	:	

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned case has this day been served by overnight delivery service upon the following counsel at the addresses listed below:

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/s/ Linda Dreeben [/s/ JW]

Linda Dreeben
Deputy Associate
General Counsel
National Labor
Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dated at Washington, D.C.
this 5th day of September, 2008

[SEAL] UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

September 5, 2008

Cathy A. Catterson, Esquire
Clerk, United States Court of
Appeals for the Ninth Circuit
PO Box 193939
San Francisco, CA 94119-3939

Re: 9th Cir. Nos. 05-75295,
05-76217 and 05-77116

Dear Ms. Catterson:

On August 25, 2008, the Court issued its decision in the above case, granting the Unions' petition, granting in part the Board's petition, and denying Macerich's petition.

Rule 19 of the Federal Rules of Appellate Procedure provides that when a court files a judgment enforcing an agency's order in part, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment conforming to the opinion. Pursuant to that rule and the Court's Order of August 25, 2008, I am enclosing the original and five copies of the Board's proposed judgment in the above-entitled matter.

After entry of the judgment by the Court, we would appreciate your returning one certified copy to this office, and sending another certified copy to the

Regional Director whose name and address are listed below. An additional copy has been provided for that purpose.

Very truly yours,

/s/ Linda Dreeben JW

Linda Dreeben
Deputy Associate
General Counsel
NATIONAL LABOR
RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

---

cc & documents to:

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NLRB Region 20
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; – UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 05-75295 NLRB No. 20-CA-29636-1 20-CA-29918-1 Northern District of California, San Francisco **MANDATE** (Filed Jun. 2, 2009)

The judgment of this Court, entered 6/2/09, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Lee-Ann Collins
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO. 05-76217
(Consolidated with Case No. 05-75295 and 05-77116)

UNITED BROTHERHOOD OF CARPENTERS
& JOINERS, LOCAL UNION 586,
UNITED BROTHERHOOD OF CARPENTERS
& JOINERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioners,

vs.

MACERICH MANAGEMENT COMPANY
and MACERICH PROPERTY
MANAGEMENT COMPANY

Respondents.

MACERICH MANAGEMENT COMPANY
and MACERICH PROPERTY
MANAGEMENT COMPANY

Petitioners,

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,
LOCALS 586 and 505,

Intervenor,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD CASE
NOS. 20-CA-29636-1 AND 20-CA-29918-1
(FORMERLY 32-CA-18123-1)

SUPPLEMENTAL BRIEF RE CALIFORNIA SUPREME COURT DECISION IN *FASHION VALLEY MALL V. NLRB*

(Filed Jan. 29, 2008)

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Counsel for Respondents
MACERICH MANAGEMENT COMPANY
and MACERICH PROPERTY
MANAGEMENT COMPANY

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* * *

V. *FASHION VALLEY* UNFAIRLY DIMINISHES A SHOPPING CENTER OWNER'S PRIVATE PROPERTY RIGHTS AND THUS VIOLATES THE TAKINGS CLAUSE.

If interpreted to apply strict scrutiny to the time, place and manner rules implemented by a privately owned shopping center, *Fashion Valley* unfairly subjects the Macerich Defendants' private property to the significant burdens placed on government property without any concomitant benefits. *Fashion Valley* requires privately owned shopping centers to open its private property to expressive activity which is directly at odds with its purely economic function. Such a ruling improperly compels private property owners to forfeit their private property rights without any, much less just, compensation. As such, *Fashion Valley* constitutes a judicial decree stripping the Macerich Defendants of the right to restrict conduct fundamentally incompatible with their dedicated use, an essential component of their private property rights, and therefore, constitutes a taking without just compensation in violation of the United States and California Constitutions. (U.S. Const., 5th & 14th Amends; Cal. Const., art. I, § 19.)

The United States Supreme Court, in its review of the *Pruneyard* decision, examined whether the California Constitution could extend free speech rights onto private property without running afoul of the United States constitutional prohibition against the taking of private property without just compensation. *Pruneyard Shopping Center v. Robins*,

447 U.S. 74, 82-83 (1980) ("*Robins*"). In rendering its decision, the Court pointedly conceded, in both the majority and concurring opinions, that "property does not 'lose its private character merely because the public is generally invited to use it for designated purposed,' and the '[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large and clustered with other stores in a modern shopping center.'" *Id.* 447 U.S. at 81.

The *Robins* Court reiterated that a restriction on property constitutes a taking where the restriction "forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at p. 83. The *Robins* Court then articulated various factors to guide the inquiry as to whether a taking has occurred, such as the "character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* With respect to the Pruneyard Shopping Center, the United States Supreme Court determined that use of the property for free speech activities unrelated to the shopping center would not unreasonably impair the value or use of their property as a shopping center, given that, *inter alia,* the shopping center "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *Id.* at 83-84.

The words of Justice White, in his concurring opinion, cautioned against the effects of a ruling such

as the Majority Opinion and what circumstances might constitute a taking:

> May a State require the owner of a shopping center to subsidize any and all political, religious, or social-action groups by furnishing a convenient place for them to urge their views of the public and to solicit funds from likely prospects? Surely there are some limits on state authority to impose such requirements . . .

Robins, 447 U.S. at 96.

Because the ban on economic boycotts in *Fashion Valley*'s directly targeted conduct and speech destructive to its substantial commercial interests, unlike the handful of students in *Robins* seeking to communicate about activity unrelated to the Pruneyard shopping center's commercial purpose, *Fashion Valley*'s rejection of Rule 5.6.2 constitutes an unconstitutional taking. The *Robins* Court did not address, let alone restrict, a shopping center's ability to regulate conduct which is directly contrary to its normal business operations, such as an economic boycott of one of its tenants. To command the Macerich Defendants to allow individuals or a group to come onto their property and engage in conduct disruptive to their normal business operations unreasonably impairs the value and use of their private property. Further, a judicial decree to that effect constitutes a taking without just compensation and unjustly intrudes upon all shopping center owners' private property rights.

The transitory nature of the trespass does not make it immune from a takings claim. *See Nollan v. California Coastal Com.*, 483 U.S. 825-832, 107 S.C. 2074 (1987) (overturning a permit condition of a state agency that required a property owner to grant a public easement over a portion of the owner's property as a condition for securing a building permit; permanent physical occupation occurs where individuals given permanent and continuous right to traverse even if no particular person allowed right to station oneself on property).

The taking here is even more egregious where shopping centers, like those operated and managed by the Macerich Defendants are engaged in a for-profit enterprise. The property owners have no duty to provide their private property to persons seeking to impair the commercial value of their investment backed expectations. Requiring the Macerich Defendants to essentially donate their property to incompatible use without compensation stands the balance of private property rights versus free speech on its head and constitutes a taking of private property without just compensation.

Moreover, to the extent it disapproves of the decision in *H-CHH v. Citizens for Representative Gov't.*, 193 Cal. App. 3d 1193, 1203 (1987), *Fashion Valley* rejected competition with the merchant's operations as a sufficient interest to justify a ban against soliciting funds, thus robbing private property owners of valuable federally protected rights. The *Fashion Valley* decision failed to identify what standard, if

any, a private property owner must meet to justify a restriction which is specifically targeted to ban conduct antithetical to its operations. The standard for publicly owned property is the Government's interest, but *Fashion Valley* articulates no similar interest of a private property owner sufficient to justify its attempt to regulate activity hostile to its normal business operations. If no such standard exists or is not readily ascertainable, or if private property owners are prohibited from protecting interests the Government may protect as to its own property, then *Fashion Valley* results in a taking.

VI. CONCLUSION

Based upon the foregoing, the Macerich Defendants respectfully request this Court approve the Board's Application to enforce their rules and deny it to the extent it seeks to invalidate any of the Macerich Defendants' lawful time, place and manner rules.

Date: January 28, 2008

KATTEN MUCHIN
ROSENMAN LLP

By /s/ Stacey McKee Knight
Stacey McKee Knight
Attorney for Respondents
MACERICH MANAGEMENT
COMPANY and MACERICH
PROPERTY MANAGEMENT
COMPANY

CAPITOLA MALL RULES FOR PUBLIC USE OF COMMON AREAS

I. Introduction

The Center is privately-owned and has not at any time been dedicated to public uses. Neither the enforcement of the following rules ("Rules") nor the conduct of any activity pursuant to these Rules shall constitute or be deemed to constitute a dedication of the Center to public uses. The Rules do not constitute an acquiescence or a waiver of the private property rights of the owners of the Center.

These Rules are not intended to apply to activity sponsored by the Center or its tenants. These Rules also are not intended to apply to private conversations between and among persons previously acquainted with one another. Some of the Rules may not apply to persons attempting to organize employees of persons or businesses engaged in work at the Center. Some of the Rules also may not apply to employees of persons or businesses engaged in work at the Center who have a labor dispute with their employer. Nevertheless, all persons seeking to use the Center's common areas for other than Center-sponsored or tenant-sponsored activity must submit an application.

Any activity not sponsored by the Center, nor specifically on Center property by state or federal labor law, nor specifically permitted under these Rules, is expressly prohibited on Center property.

II. Definitions

A. *Non-Commercial Expressive Activity*: "Non-Commercial Expressive Activity" is expressive activity that has a political, religious or other non-commercial purpose, such as the request for signatures on petitions, the registration of voters, and the dissemination of noncommercial leaflets or flyers.

B. *Permissible Activity* "Permissible Activity" is Non-Commercial Expressive Activity that is anticipated to result in individual or one-on-one communications as opposed to communications intended for a group of people simultaneously.

C. *Approved Activity* "Approved Activity" is Permissible Activity that is approved pursuant to a properly submitted application.

Activities which will *not* be approved include:

1. Performances;

2. Demonstrations;

3. Solicitation and/or acceptance of money;

4. Sales of products or services;

5. Distribution of samples of products;

6. Activities which, identify by name the Center owner, manager, or any tenant in the Center;

7. Surveys which request more information than the person's name, address and telephone number; and

8. Invitations, passes or coupons giving the recipient anything that is otherwise available to be purchased.

D. *Applicant* "Applicant" is the organization, group or person requesting access, including collectively all persons entering the Center pursuant to an approved application.

E. *Participants* "Participant(s)" are the individual(s) who engage in the Approved Activity pursuant to the application. Each reference to Applicant in the Rules shall encompass each Participant identified in the Applicant's approved application.

F. *Designated Area(s)* "Designated Area(s)" are those area(s) identified in Exhibit A to the Rules. Each Designated Area is approximately 64 square feet in size. Approved Activities may only be conducted within Designated Areas.

G. *Business Day(s)* "Business Day(s)" are Monday, Tuesday, Wednesday, Thursday, and Friday, excluding legal holidays.

III. Application Process and Procedures

A. *Submission of Application* Every person, organization or entity desiring to use the Center's common areas other than to patronize the Center's tenants or to engage in a Center-sponsored or tenant sponsored activity, must apply to the Center Management Office for permission to use the Center's property. Complete

written applications must be received in the Center Management Office by 5:00 p.m. on the fourth business day preceding the date and time desired for the proposed activity.[1] The application must be an original application; facsimile applications will not be accepted. Hours of the Center Management Office are generally 9:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal-holidays.

Applications submitted more than twenty (20) Business Days before the date of the proposed activity will not be accepted.

B. *Attachment to Application* Applications must be accompanied by legible copies of any and all items intended to be used, including but not limited to any audio-visual materials, and the text, artwork and pictures on any petitions, literature, leaflets, signs and displays. Applications also must be accompanied by legible copies of any required governmental permits or licenses.

C. *Multiple Days* An Applicant may originally request use of the Center's Designated Areas for up to three (3) consecutive days per application. An

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[1] By way of example, applications for access on Friday must be received no later than 5:00 p.m. on the preceding Monday. Applications for access on Saturday, Sunday or Monday must be received no later than 5:00 p.m. on the preceding Tuesday. Legal holidays do not count as "Business Days" in the calculation of the application due date. Therefore, the above examples would change if a legal holiday fell within the applicable time preceding the requested date.

Applicant must submit separate applications for any additional date(s). An Applicant may not use the Center's Designated Areas for more than six (6) days in any single calendar month.

D. *Multiple Locations* Applicants may only receive advance authorization to use one Designated Area on any one particular day. Applicants desiring to use a second Designated Area on any one particular day (provided that the Center has more than one Designated Area), must submit a second, separate application on the assigned date of the Approved Activity. The Center will only authorize the use of a second Designated Area if Designated Areas remain available. Although a Center may possess more than three Designated Areas, no more than three (3) Designated Areas may be in use at any one time.

E. *Review and Approval Notification* Upon receipt of a completed application, the Center's management will review the application to determine if the proposed activity is permissible. To ensure equal access, the Center will determine the availability of Designated Areas some time after the application cut-off date (the fourth Business Day prior to the first proposed date), but at least twenty-four (24) hours prior to the first date requested by the Applicant. After its review, the Center's management will make one attempt by telephone to advise the Applicant of an approved application. However, it is the responsibility of the Applicant, approximately twenty-four (24) hours prior to the time of the proposed activity, to telephone the Center Management

Office to determine if its application has been approved.

F. *Custody of Approved Application* A copy of the approved application will be available to the Applicant on or before the first day of the Approved Activity. A copy of the approved application, including all attachments, *must* be maintained within the Designated Area at all times during the Approved Activity, and the application must be produced upon request of the Center's management or security.

G. *Approved Applications/Alternate Dates* If the application is complete and complies with the Rules, but a Designated Area is not available for the date(s) and time(s) requested, the Applicant will be advised of the first alternate date and time following the requested date(s) when a Designated Area is available. If the Applicant wishes to engage in the requested activity on the alternate date(s), it must confirm its intent within two (2) Business Days after being notified of the alternate date(s) or time(s), but not later than two (2) Business Days prior to the first alternate date. If the Applicant fails to indicate its intent to use the alternate date(s) or time(s), the Center will deny the application and will return a copy of the application to the Applicant by mail with a notation indicating the reason for the denial.

H. *Renewal* An Applicant whose application has been approved and who has engaged in the Approved Activity in conformity with the approved application and these Rules may apply to continue the Approved

Activity for one additional period of three (3) consecutive days. The Applicant must notify the Center Management Office of its request, in writing, before 5:00 p.m. on the Business Day preceding the last day of the Approved Activity. Renewal will be granted only if Designated Areas are available.

I. *Denied Applications* If an application is denied, a copy of the denied application will be delivered to the Applicant personally or by mail.

IV. Deposits or Indemnity Agreements

A. *Leafletting Deposits or Indemnity Agreements* A $50.00 deposit must be submitted with the application if leaflets, flyers, etc. are to be distributed.

If the Applicant does not want to post a deposit and one is required pursuant to these Rules, the Applicant (if the Applicant is an individual or a corporation), or an individual representative of the Applicant (if the Applicant is an association or partnership) may instead agree to indemnify and hold harmless the Center, its owner and its management from any damage or loss directly caused by the Applicant's conduct. The indemnity agreement is attached to the application and must be completed, executed and submitted with the application.

B. *Damage Deposits* If the Approved Activity poses a risk of damage to property, although not one sufficient to require the Applicant obtain insurance as set forth in Paragraph V of these Rules, the Center

may require a deposit to protect the Center from potential damage.

C. *Posting Required Deposits* All deposits must be made by cashier's check or money order payable to The Macerich Partnership, L.P..

D. *Refunds and Additional Costs* If no clean-up expenses are incurred, or if the expenses incurred are less than $50.00, the deposit or balance thereof will be returned or refunded within fourteen (14) days of the Approved Activity to the address listed on the application. If expenses for clean-up and/or repair exceed $50.00, the Applicant must pay the additional expenses within seven (7) days following receipt of a written request from the Center Manager. No subsequent extension or application by the Applicant will be approved until the additional expenses are paid in full.

V. Insurance

If the nature of the proposed activity creates a risk of injury or damage to persons or property, and if that risk warrants special insurance protection, the Applicant must purchase and carry the necessary insurance coverage. The Center Manager will determine whether special insurance protection is necessary, and, if so required, will notify the Applicant.

If insurance is required, the Applicant must provide the Center Management Office with a valid certificate of insurance and a copy of the insurance

policy prior to the commencement of the Approved Activity.

VI. Permitted Locations (Designated Areas)

Approved Activity may be conducted only in the assigned Designated Area. Approved Activities are not allowed at any other location, including driveways and parking lots.

The Designated Areas are available on a first-come, first-selected basis, based upon availability at the time the Applicant is notified of approval. The Applicant must select a Designated Area at the time it is notified that its application has been approved. If the Applicant fails to do so, the Center's management will assign a Designated Area to the Applicant.

If a particular Designated Area is unavailable due to a Center-sponsored activity, construction or remodeling, use by another Applicant who has previously selected the Designated Area, or because use of the Designated Area by the Applicant poses a threat to the safety or well-being of the patrons or tenants of the Center, as determined by the Center's management, the Applicant may select another available Designated Area.

VII. Hours

Applicants may engage in Approved Activities only during the hours that the Center businesses in

closest proximity to the Applicant's Designated Area are open to the public.

VIII. Participants

The names of all Participants must be listed on the application as approved by the Center's management. Individuals not listed on the approved application may not participate in the Approved Activity. No more than one (1) group/organization may use a Designated Area at a time. No more than three (3) Participants may use a Designated Area at the same time.

IX. Check In

Each Participant must check in at the Security Office every time they arrive at the Center to commence the Approved Activity, and every time they finish the Approved Activity for each day. Each Participant must provide identification, in the form of a driver's license, state-issued identification card, or social security card, and affirm that he or she has read these Rules and agrees to abide by them.

Failure to check in at the Security within thirty (30) minutes of the beginning of the approved time period for an Approved Activity will be considered an abandonment of the right to engage in the Approved Activity and will result in termination of the Applicant's right to use the Designated Area for the entire time period requested on the Application.

X. Peak Traffic Days

The Center's management has designated certain days during each calendar year as "peak traffic days" when all Non-Commercial Expressive Activity is prohibited. Applications for these days will not be approved.

A list of the peak traffic days is attached to these Rules as Exhibit B. The Center's management reserves the right to amend this list. All Peak Traffic Days will be designated at least thirty (30) days in advance of the next new Peak Traffic Day.

XI. Furniture

The Center will supply a table with a table cloth or cover and up to three folding chairs to each Applicant. The. Applicant must notify the Center Management Office at the time of application and again upon selection of a Designated Area, of its intention to use the furniture. Applicants may not use any other furniture.

At least one Participant must be present at all times if furniture is used in a Designated Area. If furniture is left unattended for more than ten (10) minutes, the furniture may be removed and not replaced during that same day. Applicants may request permission from the Security Office to leave furniture unattended for up to thirty (30) minutes.

XII. Signage and Written Material

A. Posters, placards, displays and signs may not exceed 22" by 28" in size, must be mounted or affixed to the table, so as not to endanger any person or property, block the view of any tenant's store or display, or directly compete with Center activities or the business displays or logos of Center tenants. All posters, placards, displays and signs must be of professional quality. Applicants may not display more than two (2) posters, placards, displays or signs at any one time.

B. Signs, posters, placards, displays or written materials may not interfere with the commercial purpose of the Center or its tenants, or contain or depict "fighting words," obscenities, pornography, grisly or gruesome displays, highly inflammatory slogans likely to provoke a disturbance, or racial, religious or ethnic slurs.

C. Nothing may be affixed, attached, mounted, or placed on Center property except as specifically set forth in these Rules. Materials may not be affixed to Center furniture in such a manner as to deface, damage or destroy such furniture.

D. Participants may not place anything on the property of any tenant or patron of the Center without the prior written consent of the tenant or patron and the Center Manager.

E. Participants may hold clipboards and leaflets. Participants may not carry or wear any signs, posters or placards.

XIII. Light and Noise Level

A. Participants may not create noise of sufficient volume to impinge on the hearing or peace of the general public, as opposed to those persons within a few feet of the Participant. Yelling or "hawking" is prohibited.

B. Participants may not use, operate, or permit to be played any musical instrument, or any device, instrument or equipment for the reproduction or amplification of sound in a manner which:

1. creates noise of sufficient volume to impinge on the hearing or peace of the patrons of the Center, as opposed to those persons within a few feet of the Participant;

2. interferes with the commercial purpose of the Center or its tenants, or creates a highly inflammatory or confrontational atmosphere likely to lead to a disturbance; or

3. projects anthems or slogans that contain "fighting words," obscenities, pornography, grisly or gruesome displays, highly inflammatory slogans or racial, ethnic or religious slurs, or is likely to otherwise provoke a disturbance, or racial, ethnic or religious slurs.

C. Participants may not use lights or loudspeakers. Electrical power will not be provided.

D. Displays, visual aids, or devices with moving parts which might expose the patrons of the Center or the Center's business to danger or injury, or which threaten the health and safety of those present in the Center, are not permitted.

XIV. Decorum

Participants may not use physical, force, obscene language or gestures, or racial, religious or ethnic slurs. Participants may not physically or verbally threaten any person, engage in fighting or raucous activity, or create any disturbance which is disruptive to the Center's commercial function.

XV. Conduct

A. Participants may not:

1. impede, obstruct or interfere with any patron or tenant of the Center, or with the free flow of pedestrian traffic, including entrance to and exit from the Center and its tenants, or with patrons' view of windows and other tenant displays;

2. create litter or safety hazards of any kind, or throw, discard, or deposit any paper, glass or other matter of any kind in the Center except in designated trash receptacles;

3. eat, drink or smoke while engaging in the Approved Activity;

4. deface, damage, destroy or remove any real or personal property constituting part of, or located in or on, the Center and belonging to the Center, its patrons or its tenants; or

5. approach Center patrons outside the Designated Area regarding the Approved Activity.

B. Participants must be neat in appearance and must at all times be fully clothed, including shoes and shirts.

C. Applicants must comply with all federal, state and local laws and ordinances which regulate the Approved Activity.

D. During the Approved Activity, Applicants must keep the Designated Area and the areas surrounding it clean, neat and free and clear of trash and refuse related to the Approved Activity. Applicants are responsible for cleaning up any debris or garbage caused by the Approved Activity, including picking up and properly disposing of leaflets, handbills and flyers distributed or made available to the Center patrons as part of the Approved Activity.

E. Participants must keep all personal items, including purses, briefcases, supplies and extra materials, under the table, if any, in a safe, neat and orderly manner. Participants not using a table may not place or leave personal items on the Center property. Property may not be deposited with the

Center's management, maintenance or security. All personal property left unattended for more than ten (10) minutes will be removed and treated as abandoned property according to state law. The Center is not responsible for injury, loss or damage to Applicants or Participants or to their property.

F. Animals, other than those assisting physically disabled persons, may not be brought into a Designated Area.

G. Vehicles of persons using Designated Area(s) shall not be parked in spaces reserved for Center customers. This rule shall not apply to persons lawfully entitled to park in spaces reserved for physically disabled persons.

XVI. Sales/Solicitation Ban

Applicants may not request or receive money or other economic consideration from anyone on Center property. Applicants may not distribute commercial advertising or commercial promotional materials of any kind, or offer samples of any items which are sold, available for sale or available in exchange for a donation or contribution. Applicants may not solicit orders for, sell, or promote any items (including books, pamphlets, periodicals, tickets or other materials) or services for which money is received or credit is extended.

XVII. Non-Affiliation

Applicants may not make express or implied representations that the owner or manager of the Center, or any department store or tenant within the Center, sponsors or supports a view, belief, or request contained in any petition, statement or literature being disseminated or exhibited by the Applicant.

The Center reserves the right to post sign(s) in or near the Designated Area(s) or anywhere in or near the Center's property stating the Center's non-affiliation.

XVIII. Enforcement

A. The Center's management reserves the right to take any appropriate action including, without limitation, necessary legal action, to ensure compliance with these Rules.

1. First time violations of these Rules shall result in warnings and termination or cancellation of that Applicant's rights on that day, if necessary.

2. If necessary, legal action, including arrest, may be used to remove the Applicant from the Center if any Participant refuses to comply with these Rules.

3. A second violation of the same rule or a different rule or an Applicant's/Participant's refusal to comply with the Rules will result in termination of the Applicant's rights to engage in expressive activity

on Center property for a period of not less than six (6) months.

4. An Applicant once banned for six (6) months who violates the Rules on a subsequent occasion will be permanently banned from engaging in expressive activity at the Center.

B. Any of the following may result in revocation of Center approval and a ban on any future expressive activity by the Applicant at the Center:

1. transfer or attempted transfer of an approved application to another person or entity;

2. a false statement or representation in the application concerning a material matter, or the failure to state a material fact necessary to make the statement or representation not misleading, or concealment of any material fact which would affect the approval of the application;

3. violation of any applicable law or ordinance in the Center; or

4. failure to comply with the reasonable requests of the Center's management and/or security.

C. Nonuse of a Designated Area for thirty (30) consecutive minutes or more during an approved time period will be considered an abandonment of the right to engage in the Approved Activity and will result in termination of the Applicant's right to use the Designated Area for the entire time period requested on the application. If an Applicant fails to appear to

engage in a Approved Activity and/or abandons use of a Designated Area on three (3) or more occasions, the Applicant may not engage in expressive activity at the Center for a six (6) month period following the third such abandonment.

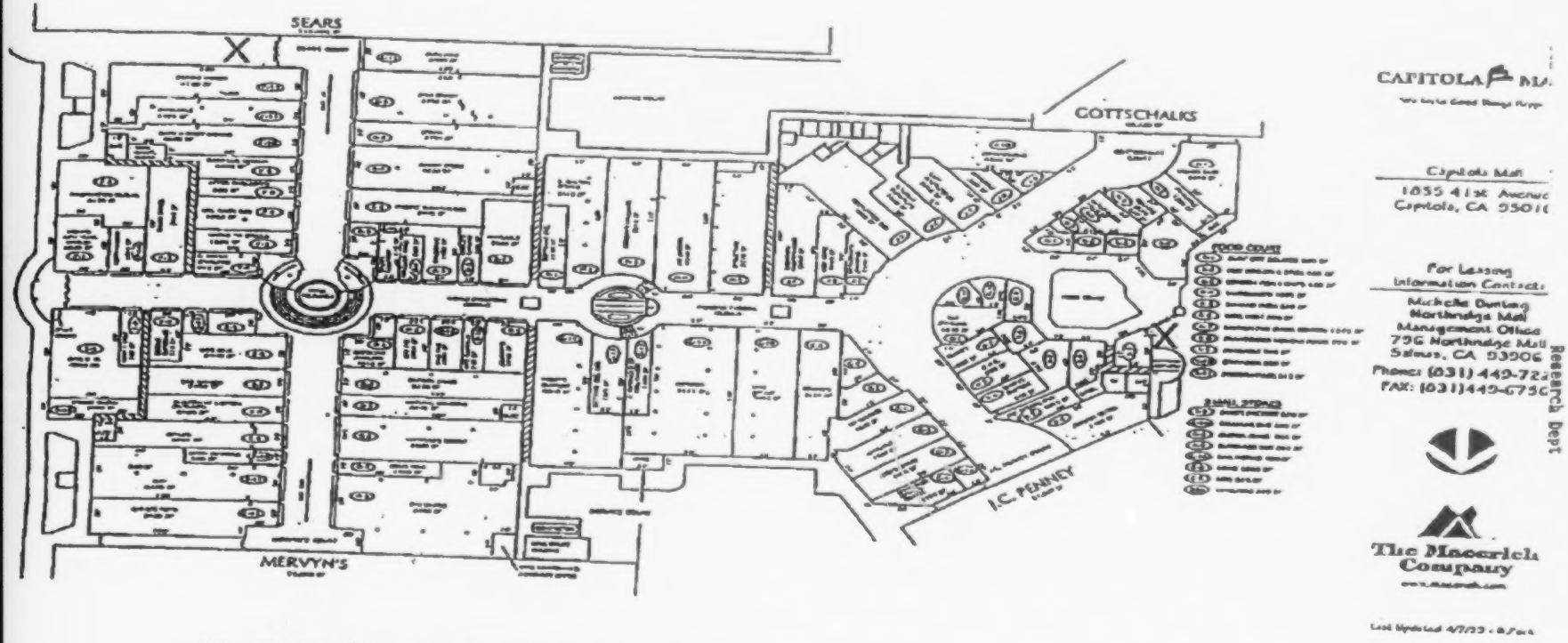
D. There will be no exceptions to any of these Rules. Failure to enforce one or more of these Rules does not constitute acquiescence nor is it a waiver of the Center's right to subsequently enforce the same or any other Rule(s).

XIX. Miscellaneous

A. Neither these Rules nor any approved application shall be deemed to or construed as creating a proprietary relationship of landlord and tenant or a fiduciary relationship or a joint venture between the Center and the Applicant.

B. To retain the ability to adapt to new or changing circumstances, the Center's management reserves the continuing right, without the necessity of advance notice or hearing, to alter, amend, modify, change, or terminate these Rules, or any of them, and/or to make new or different Rules. When any Applicant's Approved Activity is or will be affected by any change in these Rules, any then-approved Applicant will be promptly notified of such changes and will be given a copy of any new or modified Rule(s).

EXHIBIT A



X–DESIGNATED AREAS

EXHIBIT B

(TO BE PREPARED BY CENTER MANAGER)

EXHIBIT B IS A LIST OF THIRTY (30) PEAK TRAFFIC DAYS WHEN ALL NON-COMMERCIAL EXPRESSIVE ACTIVITY IS PROHIBITED.

April 2, 1999
April 3, 1999
November 26, 1999
November 27, 1999
November 28, 1999
December 4 through December 27, 1999
December 30, 1999
December 31, 1999

April 21, 2000
April 22, 2000
November 24, 2000
November 25, 2000
November 26, 2000
December 2 through December 27, 2000

APPLICATION FOR USE OF COMMON AREAS OF CAPITOLA MALL

This application must be filled out completely and legibly. An incomplete or illegible application will be rejected. Copies of all required governmental licenses and permits must be attached to this application. Complete and legible copies of any audio-visual materials and the text, artwork and pictures on any handouts, flyers, petitions, signs, etc. must be

attached. Any materials not attached to this application may not be used during the activity.

The information contained in this application will be kept confidential and will only be used by Center management in furtherance of its business activities.

Applicant's Name: _____
Applicant's Address: _____
_____
_____
Applicant's Telephone No.: _____
Applicant's Fax No.: _____

If Applicant is an Individual:

- Driver's License, State-Issued Identification, or Social Security No.:

  _____

- Entity or Organization Sponsoring or Paying for Activities:

  _____

- Contact Person: _____
- Address: _____
  (P.O. Boxes are not acceptable.) _____
  _____
- Telephone No.: _____

If Applicant is an Group or Organization:

[If the Applicant intends to distribute leaflets, fliers, etc. related to any group or organization, the group or organization must be identified on all such materials.]

- Name of Group or Organization _____
- Representative's Name:

Representative's Home
Telephone No.: _____
Representative's Fax No.: _____
– Representative's Driver's License, State-Issued Identification, or Social Security No.:

Names of Other Participants:
(All participants must be listed) _____
_____
_____
_____
_____
_____

Subject Matter of proposed activity (i.e., topic – if multiple topics, identify each)

_____
_____

Type of proposed activity (e.g., leafletting, signature gathering, voter registration)

_____

If leaflets, flyers, etc. will be handed out, with submission of the application, the Applicant must either post a $50.00 refundable deposit by check or money order, or complete the indemnity agreement attached to this application.

Date and Time of most recent expressive activity at this Center:

_____

Other locations, whether publicly or privately owned, at which the Applicant engaged in an expressive activity within the last twelve (12) months:

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Dates and Location of three most recent applications at shopping centers:

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Have you ever been denied access or had a similar application rejected? When? Where?
Please explain circumstances: _____

_____

_____

Any previous injuries to persons or property while the Applicant was engaged in similar expressive activity:

Yes _____ No _____

If Yes:

Date: _____ Location: _____
(Street Address & City) _____
Injuries to Person or Property: _____

Date: _____ Location: _____
(Street Address & City) _____
Injuries to Person or Property: _____

Date: _____ Location: _____
(Street Address & City) _____
Injuries to Person or Property: _____

General Liability Insurance (if any):

Company: _____
Policy No.: _____
Broker's Name: _____
Broker's Address: _____
_____
_____
Broker's Telephone No.: _____

Failure to be covered by such insurance will *not* be cause for denial of this application, unless foreseeable risk warrants the need for special insurance.

Please list all permits and licenses obtained from any governmental agency concerning the proposed activity:

Please attach legible photocopies of all governmental permits and licenses.

Requested dates and times of activity: _____

Choose one of the following locations:

1. NEXT TO SEARS ENTRANCE

OR

2. FOOD COURT ENTRANCE

(YOU MAY REFER BACK TO PG.2 :SECTION 5 OR TO EXHILBIT [sic] A)

Number of individuals to be engaged in the activity at any one time: 1 2 3 ___

Do you wish to use a table and chairs?
Yes ___ No ___

For persons who claim their activities are authorized by the National Labor Relations Act or applicable state labor laws:

Are you an employee of a person or business engaged in work at this shopping center who has a labor dispute with your employee [sic]? If yes, please explain:

_____

_____

_____

Are you an individual attempting to organize employees of persons or businesses engaged in work at this shopping center? If yes, please explain:

_____

_____

_____

For persons who claim exceptions to any Rule(s) based upon a disability:

Please identify the relevant Rule(s) and the manner in which you are hindered by the Rule(s) due to disability:

_____

_____

_____

By making this application, I represent that I have read the Capitola mall rules for Public use of Common Areas ("Rules") and agree to comply with all of the rules and agree that all persons identified in the application agree to comply with the rules. If this application is being made in the name of an organization or group, I represent that I am authorized to make this application in the name of the organization or group. I waive on behalf of myself and any other persons on the property pursuant to this application any and all particular claims that result other than from Capitola Mall's gross negligence or intentional conduct.

I represent and warrant that all of the information contained in this application is true and correct.

Dated: _____

_____

Signature of applicant

_____

Print name and title of applicant

FOR CAPITOLA MALL USE ONLY:

Date Received: _____ Time Received: _____

Received From: _____

Manner of Delivery: mail/personal/messenger

APPROVED:
Approved By: _____ Date: _____ Time: _____

Date(s) and Time(s) of Approved Activity: _____

_____

Location of Approved Activity: _____

Number of Participants Allowed at One Time: _____

Deposit Required yes / no

Deposit Received: _____

Indemnity Agreement Received: _____

Insurance Required: yes / no

Proof of Insurance Received: _____

Space Available: yes / no

Reasons for any modifications to access requested in application:

_____

_____

_____

Modifications:

_____

_____

_____

Modification Approved By: _____ Date _____

On Behalf of Capitola Mall _____

Modification Accepted By: _____ Date _____

On Behalf of Applicant _____

REJECTED:
Reason(s) for rejection of application:

_____

_____

Rejected By: _____ Date: _____

NOTIFICATION:

Date: _____ Time: _____

Person Notified: _____

Method of Notification: _____

_____

INDEMNITY AGREEMENT

_____ [name of individual Applicant or the Applicant's authorized representative if the Applicant is an association, corporation or partnership] hereby indemnifies and holds harmless _____ Center (the "Center"), the Center's owner, and the Center's manager from and against any claim, demand, damage, debt, liability, cost, expense or other loss incurred in connection with the cleanup of any leafletting or the distribution of other materials or arising from damage to property or persons caused by the Applicant and/or the Participants.

The undersigned acknowledges and understands that, as defined in the Capitola Mall Rules for Public Use of Common Areas:

(1) the "Applicant" as used herein means the organization, group, or person requesting access,

including collectively all persons entering the Center pursuant to an approved application; and

(2) the "Participants" as used herein means the persons who engage in the Activity pursuant to the approved application.

Date: _____ _____

Signature of Applicant or
Applicant's Authorized Representative

_____

Printed Name of Applicant or
Applicant's Authorized Representative

_____

Title/Position of Applicant or
Applicant's Authorized Representative

The following activities *are not* allowed on Mall Property:

1. Physically or verbally threatening any person, fighting, annoying others through noisy or boisterous activities, unnecessary staring or stalking, or in any other ways creating a disturbance which is disruptive or dangerous to others or the business activities of the Center.

2. Assembling for the purpose of disturbing the public peace or committing any unlawful act.

3. Using sexually explicit language, obscene gestures or racial, religious or ethnic slurs which are likely to upset or disturb the peace of other shoppers.

4. Running, skating, rollerblading, skateboarding, bicycling, or otherwise obstructing or interfering with the free flow of pedestrian traffic or with the patrons' view of windows or displays.

5. Failing to be fully clothed, or wearing apparel which is likely to provoke a disturbance or embroil other groups or the general public in open conflict.

6. Engaging in non-commercial expressive activities not in compliance with the Center's rules for such activities.

7. Soliciting money or other contributions or donations.

8. Defacing, damaging or destroying property in any area belonging to the Center, its patrons or tenants.

9. Throwing, discarding or depositing any paper, glass or other matter of any kind except in designated trash receptacles.

10. Bringing animals onto Center property, with the exception of animals in the company of, and trained to assist, physically challenged persons.

11. Possessing open cans, bottles or other receptacles containing any alcoholic beverage, except in businesses licensed to serve alcoholic beverages.

12. Smoking other than in designated smoking areas.

Persons violating these rules will be asked to leave the mall property. Those who continue to violate this code will be subject to arrest.

INTERNAL POLICIES AND GUIDELINES FOR PUBLIC USE OF COMMON AREAS FOR CAPITOLA MALL

Date: September, 1999

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INTERNAL POLICIES AND GUIDELINES FOR PUBLIC USE OF COMMON AREAS FOR CAPITOLA MALL

September 1999

CAPITOLA MALL INTERNAL POLICIES AND GUIDELINES FOR PUBLIC USE OF COMMON AREAS

INTRODUCTION

The common areas of the Center were designed and built to create a safe and comfortable shopping environment and to provide easy access for patrons and tenants of the various Centers. The common areas may be used for several purposes, including:

Center-Sponsored Activities: Center-Sponsored Activities are any activities which are sponsored by the owner of the Center, the manager of the Center, any tenant of the Center with the manager's approval, or by the Merchants' Association, if any. Easter displays, Santa Claus photo booths and car

shows are all examples of Center-Sponsored Activities.

Center-Approved Commercial Uses: Commercial uses of the common areas approved by the owner and/or manager of the Center include carts and kiosks.

Non-Commercial Expressive Activity: The United States Supreme Court established that, pursuant to the California Constitution, individuals and groups have certain rights which allow them access to the common areas of shopping centers in order to communicate with patrons, to obtain signatures on petitions directed to a governmental body or official, to register voters and/or to familiarize individuals with non-commercial subjects, subject to reasonable time, place and manner rules.

Labor Activities: Employees of persons or businesses engaged in work at the Center who have a "labor dispute" with their employer may not be required to comply with certain Center rules, including rules limiting the location and subject matter of the planned communication. Individuals or labor unions who are attempting to organize employees of persons or businesses engaged in work at the Center also may not be required to comply with certain Center rules. For purposes of these Guidelines, the term "labor dispute" means any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating,

fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

Therefore, if an application or a request for access is submitted by employees of persons or businesses engaged in work at the Center and relates to a "labor dispute" with their employer, or if an application indicates the applicant's purpose is to organize persons working at the Center, the individual reviewing the application should immediately notify the Macerich Legal Department, as designated on the First Addendum to the Guidelines, and should immediately forward to the Macerich Legal Department by facsimile the complete application, including attachments, in order to determine how the rules should be applied.

Permissible Activity: Permissible Activity is Non-Commercial Expressive Activity that is anticipated to result in individual or one-on-one communications as opposed to communications intended for a group of people simultaneously.

Approved Activity "Approved Activity" is Permissible Activity that is approved pursuant to a properly submitted application.

Activities which will *not* be approved include, but are not limited to:

1. Performances;
2. Demonstrations;
3. Solicitation and/or acceptance of money;

4. Sales of products or services;

5. Distribution of samples of products;

6. Activities which identify by name the Center owner, manager, or any tenant in the Center;

7. Surveys which request more information than the person's name, address, and telephone number; and

8. Invitations, passes, or coupons giving the recipient anything that is otherwise available to be purchased.

The Center has developed these Internal Policies and Guidelines ("Guidelines") and Rules for Public Use of Common Areas ("Rules") to assist managers in complying with the applicable court decisions concerning Non-Commercial Expressive Activity in the Centers' common areas. Although the Center may not agree with the Supreme Court's decision allowing such activity, it is committed to honor and abide by the law. The Guidelines and Rules are in Macerich's discretion subject to modification as indicated by changing laws and court decisions. No one may modify, change, ignore or waive any provision of the Guidelines or Rules without the express authorization of the Macerich General Counsel or Associate General Counsel or their designee.

The Guidelines and the Rules do not apply to Center-Sponsored Activities, Center-Approved Commercial Uses or certain Labor Activities. Further, if the proposed activities are not within the definition of

Permissible Activities as set forth in these Guidelines and the Rules, and do not constitute Center-Sponsored Activities, Center-Approved Commercial Uses, or permitted Labor Activities, they are prohibited in the common areas.

If you have any questions concerning these types of uses, or if you question whether the Guidelines and Rules apply to a particular activity, contact one of the persons identified on the First Addendum to the Guidelines.

Following are guidelines to assist you in administering the Rules.

1. Common Areas

The common areas of the Centers include any property in the Centers that is open to the public; other than property exclusively leased to a tenant. The Rules and Guidelines are intended to assist in the "management" of the common areas.

While Approved Activities are only allowed in the Designated Areas, as described below, other activities may be allowed in other portions of the common areas. For example, carts, kiosks and promotional activities are governed by other rules. If the Center's owner, a Center tenant, or someone else working at the Center is involved in a labor dispute, then the National Labor Relations Act or California labor law may require that special arrangements be made to accommodate that particular activity.

2. Designated Areas

Allowing Applicants to freely circulate throughout the Center and its parking areas greatly increases the chance of injury to patrons and of damage to property. Therefore, to ensure orderly movement of persons and to protect the safety of patrons, Approved Activities are allowed only in the Designated Area(s). Exhibit "A", prepared by or for the Center Manager and attached to the Rules, sets forth the Designated Area(s) available for use by Applicants. While more than three (3) Designated Areas may exist at the Center, only three (3) Designated Areas may be used for Approved Activities at any one time.

A. Location of Designated Areas

To select the Designated Areas located in your Centers, the following criteria are to be used: (1) areas which are to be clear and free of obstacles by applicable building and fire codes, or the uniform building and fire codes, should be excluded (this is typically a minimum of ten feet clearance from entrances, exits, escalators and elevators); and (2) areas over which a tenant, an adjacent property owner or a third party has control (i.e., tenant set-off restrictions) should be excluded. Designated Areas are to be set at least 30 feet apart, at least 20 feet from any entrance to the Center, elevator, escalator, anchor store entrance, and Center-Sponsored Activity, and at least 10 feet from the entrance to any tenant

premises or curb line. Designated Areas should be approximately 64 square feet in size, which is equal to the sphere of influence of a cart or kiosk. This criteria should result in "floating" areas, i.e. areas which are not backed up or adjacent to walls, posts, poles or other permanent fixtures.

B. Number of Designated Areas

To the extent possible, each Center should have no less than two (2) and no more than five (5) Designated Areas.

C. Remodeling or Expansion – Change in Designated Areas

When a Center is remodeled or expanded, certain areas may not be available and new areas may become available. After a remodel or expansion, safety requirements must be verified, and an updated Exhibit A must be prepared and attached to the Rules.

3. Scope of Permissible Activity

A. Definition

The Rules apply to all Permissible Activity, which is defined in Paragraph II A. of the Rules as Non-Commercial Expressive Activity that is anticipated to result in individual or one-on-one communications as opposed to communications intended for a group of people simultaneously.

B. Subject Matter

The subject matter of the proposed activity may not be business-related. The sale or promotion of items or services, or advertising for items or services for sale is prohibited. Essentially, if money or other consideration is to be paid and/or received at the Center (including charitable donations), the proposed activity does not constitute permissible Non-Commercial Expressive Activity and will not be allowed in the Center as a Approved Activity. The Center may, however, rent space to any group or individual as a temporary tenant if such group or individual otherwise qualifies as a tenant.

Non-Commercial Expressive Activity that promotes a non-profit activity and incidentally seeks monetary contributions is permitted as long as *no money, credit or other consideration is received on Center property.* For example, a leaflet which has a membership application as part of the leaflet is permissible if the leaflet is otherwise permissible. However, fund raising within the Center may not be the primary purpose of the proposed activity.

A proposed activity may not be prohibited simply because its subject matter is unpopular. For example, you may not ban unpopular groups such as the American Nazi Party or animal rights groups opposing the sale of fur products unless you are otherwise permitted to do so under these Guidelines or the Rules.

Unless the proposed activity is a labor dispute, as defined in these Guidelines, you may not approve an application for an activity that targets and/or identifies by name the Center's owner or manager, or a tenant in the Center. For example, you may not approve a non-labor related application for an activity which seeks to encourage patrons to "Boycott Bullocks," but you may not reject an application that is labor-related and meets the criteria set forth under "Labor Activities" herein.

If in doubt, have the Applicant submit an application, and then review the application with the appropriate supervisors or Macerich Legal Department.

C. Communication with Patrons

An Applicant may use a Designated Area to speak with more than one patron at a time as long as the Applicant does not otherwise violate another Rule and a crowd does not gather so as to obstruct pedestrian traffic flow.

4. Dissemination of Rules and Applications

Anyone requesting a copy of the application and/or Rules for use of the common areas should be given an application and a copy of the Rules. ***They should not, however, be given a copy of these Guidelines.*** Anyone who specifically requests an application or Rules for any activity other than Non-Commercial Expressive Activity, or who says that their activity is

not covered by the Rules, should be referred to the Center Manager or the Assistant Manager or their designee (the "Center's Representative").

It is the duty and responsibility of the Center's Representative to explain the owner's policy with respect to use of the common areas. The owner's policy is to allow Non-Commercial Expressive Activity in the Center on a nondiscriminatory basis, subject to reasonable time, place and manner rules. The owner does not allow any other non-Center-Sponsored Activity, unless expressly required by law. This policy exists to protect the Center's commercial environment, which the owner has developed in conjunction with the anchor stores and the other tenants.

5. Processing Applications

The Center will only process original written applications. Applications sent by facsimile will not be accepted. An application received by facsimile should be retained by personal delivery, mail or facsimile with a notation that it was not considered because it was submitted by facsimile. An Applicant may request use of a Designated Area for up to three (3) consecutive days on each application.

A. Application Log

The Center's Representative must maintain an Application Log listing every application processed by the Center. The Application Log should identify the

Applicant's name, the date the application was approved or denied. If an application is approved, the Application Log should also indicate the date(s) the Applicant engaged in the Approved Activity and any problems related to the Approved Activity. The Application Log should be maintained for five (5) years.

B. Acceptance of Multiple Applications

Applicants may only receive advance authorization to use one Designated Area on any one particular day. Applicants desiring to use a second Designated Area on any one particular day (provided that the Center has more than one Designated Area), must submit a second, separate application on the day of the Approved Activity. The Center will only authorize the use of a second Designated Area if a Designated Area remains available. The Center should accept multiple applications submitted by an Applicant for successive or subsequent three (3) day periods as long as the applications are otherwise proper.

An Applicant may not use Designated Areas for more than six (6) days in any single calendar month.

C. Review for Completeness

When an application is received by the Center Management Office, it should *immediately* be reviewed for completeness. (The application should be reviewed by the Center's Representative, or, if

necessary, by other properly supervised personnel.) If determined to be complete, the person reviewing the application shall reflect receipt of the application by signing the application and entering the date and time of receipt. The application should be considered complete only if it has attached to it legible copies of any and all items intended to be used, including but not limited to any audio-visual materials, and the text, artwork, and pictures on any signs, petitions, handouts, and flyers. The application must also be accompanied by any permits or licenses which the Applicant is required to obtain from any governmental agency in order to engage in the proposed activity. The Center's Representative should check with local governmental agencies to determine what requirements, if any, exist in this regard.

If the application is not complete, a copy of the application should be returned to the Applicant immediately by personal delivery, mail or facsimile. The returned incomplete application should contain (or be accompanied by) a written explanation of the omission(s). The original application with the written explanation of the omission(s) should be kept for one (1) year and then discarded. The Applicant's name, the date of the application and the denial should be noted in the Application Log.

D. Review for Timeliness

All applications must be *received* by 5:00 p.m. on the fourth (4th) Business Day (not including

weekends or legal holidays) prior to the first date of the proposed activity. Business Day(s) are defined in the Rules as Monday, Tuesday, Wednesday, Thursday, and Friday, excluding legal holidays. The following schedule sets forth the applicable deadlines for receiving applications:

Proposed Activity Date	Submission Date
Monday	Preceding Tuesday
Tuesday	Preceding Wednesday
Wednesday	Preceding Thursday
Thursday	Preceding Friday
Friday	Preceding Monday
Saturday	Preceding Tuesday
Sunday	Preceding Tuesday

If an application is received after 5:00 p.m. on the fourth (4th) business day prior to the first date requested, the application should be returned to the Applicant by personal delivery, mail, or facsimile, and should indicate tardiness as an explanation for its return. Applications will not be accepted more than twenty (20) Business Days preceding the first date desired for the proposed activity. If an application is received more than twenty (20) Business Days prior to the first date requested, the application should be returned to the Applicant by personal delivery, mail, or facsimile, and should indicate prematurity as an explanation for its return. A copy of the application with the written explanation should be kept for one (1) year and then discarded. The Applicant's name, the date of the application, and the denial of the application should be listed in the Application Log.

E. Review for Determination of Whether Proposed Activity Is Permissible

If an application is timely received and is complete, the application should then be reviewed by the Center's Representative to ensure that the proposed activity is within the scope of Permissible Activities, as set forth in Section 3 above and in the Rules. If the proposed activity is not permissible, the person reviewing the application should so indicate on the application in the space provided and should complete that portion of the application indicating denial. A copy of the denied application, with a notation reflecting the reason for the denial, should be returned to the Applicant immediately by personal delivery, mail or facsimile. The original application with the written explanation of why the application was denied, should be kept for one (1) year and then discarded. The Applicant's name, the date of the application, and the denial of the application should be listed in the Application Log.

This review should occur as soon as reasonably possible and should be completed no later than twenty-four (24) hours before the date and time of the requested commencement of the proposed activity. If an application is complete, timely, and is for an activity which is permissible under the Guidelines and Rules, the application should be approved.

F. Modifications to Requested Activity

i. When Modification Is Appropriate

If a complete and timely application is received for an activity which is within the scope of Permissible Activities but which proposes a type of activity or use of materials which is not proper pursuant to these Guidelines or the Rules, and if the Applicant will agree to restrict its activity to that allowed by the Guidelines and Rules, the application should be approved with modifications. Such modifications may be made if the proposed activity:

a. includes the use of fighting words, obscenities, pornography, grisly or gruesome displays, highly inflammatory slogans or materials likely to provoke disturbance, or racial, religious or ethnic slurs;

b. is so confrontational in nature that it is likely to provoke a disturbance;

c. threatens to physically interfere with the conduct of business, the movement of customers and tenants, or with the customary uses of the Center by its form, size, location or timing; or

d. proposes distribution of materials or communications, or use of lights, instruments, equipment or mechanical devices otherwise inconsistent with the Rules.

ii. Modifying the Application

If the proposed activity includes materials or encompasses activities which are prohibited, the person reviewing the application should complete that portion of the application reflecting a variation of the requested access, and should indicate on the application in the space provided that the application is provisionally approved but the Applicant is prohibited from distributing the proposed material(s) or engaging in the forbidden action(s) or entering at specified times or dates.

iii. Notification of Modification

If an application is provisionally approved with modification(s), an attempt should be made to notify the Applicant by telephone or facsimile of the proposed modification(s). If the Applicant refuses to abide by the proposed modification(s), the application should be denied. A copy of the denied application with the proposed modification(s) and reflecting the Applicant's stated refusal to abide by the proposed modification(s) as a reason for the denial should be returned to the Applicant immediately by personal delivery, mail, or facsimile. The original application with the proposed modification(s) and the details of the Applicant's comments should be kept for one (1) year and then discarded. The Applicant's name, the date of the application, and the denial should be listed in the Application Log.

If the Applicant agrees to abide by the modification(s), the Applicant must sign the section of the application which outlines the proposed modification(s) and indicates acceptance of the modification(s). Once the Applicant signs that section, the application shall be treated as an approved application. If the Applicant refuses to agree to the modification(s) and to acknowledge the modification(s) by signing the application as modified, the application should be denied. A copy of the denied application with proposed modification(s) and reflecting the Applicant's stated refusal to agree in writing to the proposed modification(s) as a reason for the denial should be returned to the Applicant immediately by personal delivery, mail or facsimile. The original application with the proposed modification(s) and the details of the Applicant's comments should be kept for one (1) year and then discarded. The Applicant's name, the date of the application, and the denial should be listed in the Application Log.

G. Availability of Area and Priority

Once an application is approved, the Center's Representative should review the Center calendar to determine if a Designated Areas [sic] is available for the date(s) and time(s) requested. To ensure equal access to all Applicants, determination of the availability of Designated Areas should be made some time after the application cut-off date, as set forth in paragraph 5.C. of these Guidelines, but at least twenty-four (24) hours prior to the first date and time requested.

As between Applicants, any Applicant who has not engaged in or been approved to engage in an Approved Activity any time during the previous two (2) weeks should be given priority over Applicants who have had access during the previous two (2) weeks. However, no Applicant's rights may be terminated in favor of another Applicant. Priority generally should be based upon the date and time of receipt of the application, other than as provided herein.

The availability of a Designated Area is based on the number of available Designated Areas as set forth in Exhibit A, reduced by those Designated Areas which are scheduled to be occupied by Center-Sponsored Activities, and further reduced by the number of Applicants which have previously applied for and been approved to use available Designated Areas. While more than three (3) Designated Areas may exist at the Center, only three (3) Designated Areas may be used for Approved Activities at any one time.

Center-Sponsored Activities receive first right of selection on available Designated Areas. The Center Manager and the Marketing Director should use their experience to determine which areas are needed for a particular Center-Sponsored Activity. For example, the use of one area for a display or promotional activity may require the assignment of adjacent Designated Areas to the Center-Sponsored Activity to accommodate anticipated crowds.

H. Notification of Approval/Selection of Designated Area

After an application has been reviewed and approved, the Center's Representative should attempt to notify the Applicant (by telephone or facsimile) as soon as reasonably possible *after* the application cut-off date (the third day prior to the proposed commencement date) but at least twenty-four (24) hours prior to the first date and time of the proposed activity. Even though the Applicant is responsible for calling to determine if the application is approved, the Center's Representative should make at least one (1) telephone attempt to notify the Applicant. If the Center's Representative notifies the Applicant of approval by leaving a message on a telephone answering machine or other message service, such notification should be noted on the approved application.

The Applicant may telephone the Center Management Office to inquire if an application has been approved. If the application has been approved, the Applicant must pick up a copy of the approved application at or before the time the Approved Activity is scheduled to begin. The copy of the approved application must be accompanied by a letter specifying the check-in procedure to be followed by the Applicant prior to commencing the Approved Activity at the Center.

The original application should be put in the Center Manager's file. A copy of the application

should be forwarded to the head of security for the Center, if any.

Applicants should select a Designated Area when they are notified of the approval of their application. Applicants do not have any rights to a particular Designated Area, except on a first-come, first-selected basis. If the Applicant does not select a Designated Area when notified of the approval of the application, then the Center's Representative should select the Designated Area.

An Applicant should be denied the use of a particular Designated Area if the Designated Area is occupied by a Center-Sponsored Activity or by another Applicant who has previously selected the Designated Area. An Applicant may also be denied use of a particular Designated Area if such use poses a threat to the safety or well-being of the patrons or the tenants of the Center. The following criteria should be used to determine if such a threat exists:

i. whether the planned manner of presentation of the Approved Activity is so confrontational that it is likely to embroil other groups or the general public in open conflict;

ii. whether groups of competing viewpoints or incompatible philosophies have requested use of the same general area on the same date and during the same hours; and

iii. whether the planned activity, by its size and/or timing threatens to block the flow of traffic or

impede access to the Center or its tenants, or create a hazardous degree of congestion.

The existence or likelihood of any of the foregoing criteria supports a determination that a threat to the safety or well-being of customers or employees exists.

I. Alternate Time/Date

If no Designated Area is available for the date and time requested, the Applicant should be notified that its application was approved, but that space was not available. The Applicant should be informed of the next available date(s) and time(s). Such notification should be attempted by telephone or facsimile at least twenty-four (24) hours prior to the first date requested. At the time of notification, the Applicant should be advised that s/he must confirm his or her intent to use the alternative date(s) or time(s) within two (2) Business Days after being notified of alternative available dates, but no later than two (2) Business Days prior to the first alternate date.

If an Applicant is refused access because a Designated Area is not available due to use by other Applicants, the Applicant who was refused access should receive priority for the next available date over Applicants then using Designated Areas who request continued access.

J. Renewal

An Applicant whose application has been approved and who has engaged in the Approved Activity in conformity with the approved application and the Rules may apply to continue the Approved Activity for one additional period of three (3) consecutive days. The Applicant must notify the Center Management Office of its request, in writing, before 5:00 p.m. on the Business Day preceding the last day of the Approved Activity.

If an Applicant requests to extend access beyond its initial three (3) day period, such supplemental application may be granted if timely made and if a Designated Area is available. A determination as to whether or not a Designated Area is available shall be made pursuant to the procedures set forth previously. If only part of the requested additional period is available (i.e. two (2) days out of three (3) days), the Applicant should be informed of such unavailability and should be allowed to engage in the Approved Activity on the available days.

6. Deposits

A. Leafletting Deposit or Indemnity Agreement

If an Applicant intends to distribute any written materials, the Applicant must either deposit $50.00 or sign the indemnification agreement set forth on the application, to cover the cost of cleanup required as a result of the Applicant's conduct. Failure to deposit $50.00 or deliver the indemnity agreement

will result in the immediate cancellation and termination of the Applicant's right to distribute materials. The option to use the indemnity agreement in lieu of the deposit belongs to the Applicant and not to the Center's Representative or the Center's Owner.

The deposit or the signed indemnity agreement, if required, must be received by the Center's Representative prior to commencement of the Approved Activity.

B. Damage Deposit

A damage deposit should be required if the nature of the proposed activity is not a sufficient risk to necessitate the Applicant obtain insurance, as set forth in Section 7, but creates a risk beyond that created by a typical Center patron. A damage deposit should only be required if the conduct of a person or group engaged in a similar activity for a similar purpose to that proposed by the Applicant previously resulted in minor property damage. This alternative to insurance is available only when the sole concern is minor damage to property. The amount of any damage deposit must be based upon prior damage and experience and should be sufficient to pay for any repairs which may result from the Applicant's conduct.

C. Post Activity Procedure

i. If Costs Exceed Deposit, If Any

If expenses for clean-up and/or repair exceed the amount of the deposit given, or if no deposit has been given and expenses are incurred, the Center' [sic] Representative should prepare a written statement identifying the charges incurred and the reason(s) therefore. The statement should be sent within fourteen (14) days, via certified mail, return receipt requested, to the Applicant along with a cover letter requesting that the amount set forth on the statement, less any deposit, be paid within seven (7) days of the Applicant's receipt of the letter and statement. The cover letter should also advise the Applicant that no subsequent application by the Applicant will be approved until such amounts are paid in full.

ii. If Deposit Exceeds Costs, If Any

If no expenses are incurred, or if the expenses incurred are less than the full amount of the deposit, the deposit or balance thereof should be returned or refunded within fourteen (14) days of the last date the Applicant engaged in the Approved Activity at the Center. Any partial refund should be accompanied by a statement identifying the charges incurred. If there is no refund because the entire deposit was used for clean-up costs, a statement identifying the charges should be sent to the Applicant within fourteen (14) days.

7. Insurance

Insurance should be required of the Applicant if:

a. there is a prior history of injury to persons or property when:

i) this Applicant has engaged in similar activities; or

ii) individuals or groups similar to the Applicant engaged in activities similar to that proposed by the Applicant; and

b. the scope of the risk based on the prior history exceeds the minimal or inconsequential; and

c. the risk cannot be lessened or eliminated by adjusting the time, date, place or planned manner of the proposed activity; or

d. where such an adjustment would lessen the risk to a minimal or inconsequential level, the Applicant is unwilling to make such an adjustment.

If insurance is required, the Applicant must provide a comprehensive general liability insurance policy with an aggregate combined, single-limit liability for both bodily injury and property damage of not less than $250,000.00. The policy must name as additional "named" insureds each of the parties required to be listed as "named" insureds on Center tenant's and/or contractor's insurance policies. (Generally the "named" insureds include the owner, the management company, and managing agent, The Macerich Partnership, L.P., The Macerich Company,

and any required partners or lenders.) The policy must expressly relieve each of the "named" insureds from any obligation to comply with any provisions of the policy, such as payment of premiums.

If the Center's Representative determines it is appropriate to require liability insurance, the Applicant may not engage in any proposed activity until a valid certificate of insurance and a copy of the insurance policy have been delivered to the Center Management Office.

8. Number of Participants

Due to concerns over congestion and blockage of foot traffic, one (1) group represented by three (3) Participants present in any one Designated Area and at any one time is presumed to be reasonable. If an Applicant requests permission for more than three (3) Participants to be present in a Designated Area, the request should be granted only if the Applicant presents special requirements and if the presence of the additional Participant(s) will not increase the likelihood that the Approved Activity will block the flow of traffic or create a hazardous degree of congestion.

The Center's Representative may limit an Applicant to fewer than three (3) Participants if other activities at the Center so require. Factors to consider in determining whether to limit the number of Participants include:

a. whether one or more Center-Sponsored Activities or tenant-sponsored events (such as red tag sales) are occurring;

b. whether the event(s) is/are Center-wide;

c. whether the event(s) involve(s) one or more anchor stores; and

d. whether the event(s) has/have a history of increasing the number of individuals visiting the Center during the event, and, if so, the degree of additional traffic expected.

When an Applicant is approved for other than three (3) Participants, the grounds for such change must be noted on the application.

Only those Participants listed on the approved application may participate in the Approved Activity. Individuals not listed as Participants on the approved application should be asked to leave the Designated Area.

9. Check In Process

To ensure that the number of Participants engaging in the Approved Activity at any one time does not exceed the number approved and to verify that only approved Applicants are using the Designated Area, all Participants must check in at the designated location every time they arrive at the Center to commence the Approved Activity, and every time they have finished the Approved Activity for

each day. All Participants are required to check in and check out each and every time they participate in the Approved Activity. Check in will require that the Participants provide a driver's license, state-issued identification, or social security card and affirm that they have read the Rules and agree to abide by them. The notification letter must explain the check in procedure. A form check in sheet has been provided to you and should be completed each time a Participant checks in or checks out.

10. Completion of Activity Checklist

To the extent possible, within the first hour of the Approved Activity, on each day of the Approved Activity, security personnel or the Center's Representative should complete in full the Capitola Mall Expressive Activity Checklist ("Checklist"). Any violations of the Rules should be noted on the Checklist. If the Applicant is in violation of the Rules, security personnel or the Center's Representative should immediately notify the Center Manager or the Center Manager's supervisor. The Applicant's name, the date of the application, and the denial should be listed in the Application Log.

11. Peak Traffic Days

Attached to the Rules as Exhibit B is a list, prepared by or on behalf of the Center's Owner, of "Peak Traffic Days." On these days Non-Commercial Expressive Activity cannot be accommodated without

significantly increasing the risk of damage or injury to the Center's property, patrons, tenants or commercial interests. Applications to engage in Non-Commercial Expressive Activities on Peak Traffic Days will not be approved.

Peak Traffic Days are those days which the Center Manager and Marketing Director believe to be the thirty (30) days per calendar year of highest patronage at the Center or days when the Center or its tenants are conducting significant promotional activities. All thirty (30) Peak Traffic Days should be assigned, with any days not used during the first ten (10) months of the year designated for the time period between Thanksgiving and December 31. For example, if it is determined that there are only fifteen "high traffic" days between January 1 and November 15, the remaining fifteen days should be distributed from Thanksgiving through December 31.

The list of Peak Traffic Days may be amended from time to time. It is therefore important that the Rules, which are distributed to the public, at all times contain the most recent listing of Peak Traffic Days. Peak Traffic Days may be reassigned (i.e. moved out of the holiday season to earlier in the year) as long as such adjustment is made at least thirty (30) days prior to the new Peak Traffic Day.

12. Furniture

The Center should provide tables, covers and chairs to Applicants who desire to use furniture. The

Owner believes that by providing a table and up to three (3) chairs to any Applicant upon request, it will eliminate the use of furniture which is inconsistent with the aesthetic design of the Center.

It is the Applicant's responsibility to make sure that an authorized individual is present at all times if furniture is located in a Designated Area. If furniture is left unattended for more than ten (10) minutes, the furniture should be removed. Removed furniture should not be replaced during that same day. Unattended furniture can be a hazard in the Center and is not consistent with the aesthetic image which the Center is attempting to create.

An Applicant may request permission to leave furniture unattended for up to thirty (30) minutes. Such a request should be granted if the Applicant is an individual, or if there is only one Participant staffing the table at the time the request is made.

Unless prevented by a lack of adequate staffing, furniture should be set up no more than fifteen (15) minutes before the proposed commencement time and should be removed at the end of the approved time period.

13. Mechanical Devices and Moving Displays

The following criteria are to be taken into consideration when determining whether or not a mechanical device or moving display creates a danger

or threat to public safety sufficient to warrant its prohibition:

a. whether there is a history of injury or damage when such devices have been used;

b. whether the movement of the device threatens to come into physical contact with any patron or tenant of the Center;

c. whether the device threatens to impede the movement of customers or tenants, block the flow of traffic, or otherwise create a hazardous degree of congestion; and

d. whether the risk can be lessened or eliminated by adjustment in the place or manner of use and whether the Applicant is willing to make such adjustment.

14. Abandoned Property[2]

If property is left unattended for more than ten (10) minutes, or for more than thirty (30) minutes if permission is given for such time period, the property may be removed from the common areas and placed in storage within the Center. The Center's Representative should, within seven (7) days of the abandonment of such property, notify the Applicant

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[2] The following procedures are those authorized by California Civil Code Section 2080 *et seq.* for handling abandoned and unclaimed property.

by certified mail, return receipt requested, that the Center has taken possession. The notification should advise the Applicant that such property will be maintained for a period of not less than thirty (30) days and may be claimed by the Applicant upon payment of any reasonable charge made for storage and care of such property.

If the Applicant does not claim the property within thirty days, and its value is determined to be less than $100.00, the Center may dispose of the property in any manner. If the value of the property is greater than $100.00, at the expiration of the thirty (30) day period, such property should be treated as abandoned property as set forth in California Civil Code Section 2080.1 and should be delivered to the local police department or sheriff's department.

15. Non-affiliation

The Center has reserved the right to post signs in the common areas outside of the Designated Areas, and on or adjacent to the Applicant's table or in the selected Designated Area (if Applicant is not using a table). The signs should state that the activity in which the Applicant is engaging is not sanctioned, condoned or endorsed by the Center or its management.

No sign, sticker or other disclaimer should be placed in such a manner as to unreasonably interfere with the Approved Activity. If a sign is placed on the table, it should not exceed 4" tall by 12" long. If a sign

is placed adjacent to the table or in the Designated Area, it should be similar in size to other signage used by the Center.

When Applicants engage in Approved Activities at the Center, temporary signage may be used at all entrances and adjacent to all Designated Areas in use. If temporary signage is used, it should be used consistently. Unless prevented by a lack of adequate staffing, the temporary signage should be set out no more than fifteen (15) minutes before the proposed commencement of an Approved Activity and should be removed at the end of the approved time period.

The following language should be used on non-affiliation signs placed *outside* the Designated Areas:

> The management of this shopping center is obligated by law to allow individuals and groups access to this center to seek signatures on petitions and to distribute informational materials. These persons are neither sponsored nor endorsed by the management, and we apologize for any inconvenience they may cause you.

The following language should be used on signs placed *inside* the Designated Areas or on the Applicant's table:

> Petitioners and solicitors are here without the endorsement of Management.

16. Enforcement

A. General Policy

The enforcement mechanism described in these Guidelines is not intended to be punitive. It is designed to ensure compliance with applicable ordinances, laws and the Rules. Therefore, after notifying the Applicants, or individuals, that they are not complying with an ordinance, law, or Rule, the Center's Representative should allow a reasonable amount of time to correct the action or omission prior to enforcing the sanctions available.

If an Applicant or individual refuses to comply with the Rules or applicable laws or ordinances, a member of the Management staff should communicate with the Applicant with respect to the situation. If required, removal from the premises ("arrest") may only be effected after consultation with one of the persons identified on the Addendum to the Guidelines.

B. Persons Without Approved Applications

When an individual or group in the Center commences an activity in a Designated Area, the Center's Representative or a security officer should approach the individual(s) and ask to see an approved application. If no approved application is produced, the individual(s) should be advised that they must apply and receive approval prior to engaging in the activity. The individual(s) should be given the "Notice," attached hereto as "Exhibit A," describing

the Owner's position. The security officer or Center's Representative should instruct the individual(s) that a copy of the Rules and an application are available at the Center Management Office.

In addition to the "Notice," a one (1) page statement entitled "Free Speech Rights in California Shopping Centers," attached hereto as "Exhibit B," describes pertinent court decisions supporting the Owner's legal position. Both of these documents should be kept at the Center's Management Office and the Security Office. If an individual begins "citing" the law, the security officer or the Center's Representative should provide a copy of the statement entitled "Free Speech Rights in California Shopping Centers" and should encourage the individual to visit the Center Management Office during business hours to review and/or obtain a copy of the Rules. The goal is to appear non-confrontational and to persuade the individual(s) to voluntarily leave the common area. The Center's Representative and security officers should prevent the conversation from becoming a focal point for other persons in the Center.

If the individual(s) refuse to voluntarily leave the common area, the Center's Representative should be advised. **Unless there is an immediate threat to persons in the Center, the decision to arrest and/or remove an individual for engaging in Non-Commercial Expressive Activity without an approved application should be made only after consulting one of the persons identified**

on the Addendum to the Guidelines. If there is an immediate threat to the safety of any person, the senior management representative present, or in his or her absence the senior security officer present, may take those steps necessary to protect the safety of persons in the Center. This authority is very limited and only may be exercised to protect the well-being of persons in the Center.

C. Persons With Approved Applications

If an individual or group has an approved application but is not following the ordinances, laws, or Rules, then the individual or group should be advised of the violation and should be given the opportunity to correct the problem immediately. If the individual or group thereafter continues to violate the ordinances, laws, or Rules after such notice, the Center's Representative should be advised. **The decision to remove and/or arrest such an individual or group may not be made without consulting one of the persons identified on the Addendum to the Guidelines.** If there is an immediate threat to the safety of any person, the senior management representative present, or in his or her absence the senior security officer present, may take those steps necessary to protect the safety of persons in the Center. This authority is very limited and only may be exercised to protect the well-being of persons in the Center.

D. Assistance of Police Agencies

The decision to arrest may be made only in consultation with one of the persons identified on the Addendum to the Guidelines. The local police agency, whether it be police or sheriff, should not be called to the Center until consultation with one of the persons identified on the Addendum to the Guidelines has been completed. The presence of the local police or sheriff sometimes can exacerbate the situation, if a decision is made not to arrest anyone. This policy of refraining from calling the police until such time that one of the persons identified on the Addendum to the Guidelines has been consulted applies both to situations involving an individual or group that has not properly applied to conduct the activity on the premises, as well as occasions when an individual or group has violated the local ordinances, laws, or Rules.

17. Delegation of Responsibilities

The Center Manager shall not delegate his or her responsibilities (although the ministerial performance of such Center Manager responsibilities may be assigned to others as the Center Manager sees fit). The decisions required by these Guidelines must be made by the Center Manager. In the absence of the Center Manager, consult with one of the persons identified on the Addendum to the Guidelines. All office personnel should be familiar with the Rules and

these Guidelines. All security personnel should also be familiar with the Rules and these Guidelines.

18. Amendment of Rules

The Rules may not be modified or amended without the express written authorization of the Macerich General Counsel or Associate General Counsel or their designee.

ADDENDUM

The following individuals may be contacted regarding public access issues:

1) Carol Milton	Phone: (310)394-6000 (800)421-7237 Fax: (310) 393-0756 E-mail: carol_milton@macerich.com
2) Chet Cramin	Phone: (310)394-6000 (800)421-7237 Fax: (310)393-0756 E-mail: chet_cramin@macerich.com
3) Steve Spector	Phone: (310)394-6911 (800)421-7237 Fax: (310)395-2791 E-mail: steve_spector@macerich.com

In the event of an emergency if none of the above individuals are available, or if one of the above-referenced individuals so advises, the following individuals should be contacted:

1) Thomas J. Leanse, Esq.	Phone (W):	(310) 788-4475
	Phone (H):	(310) 474-8167
(Fax to both numbers)	Fax:	(310) 712-8426
	Fax:	(310) 788-4471
	E-mail:	tleanse@kmz.com
2) Cheryl L. Van Steenwyk, Esq.	Phone:	(310) 788-4487
	Fax:	(310) 788-4471
	E-mail:	cvanstee@kmz.com
3) Laurie A. Cohen, Esq.	Phone:	(310) 788-4782
	Fax:	(310) 788-4471
	E-mail:	lcohen@kmz.com

EXHIBIT A

NOTICE

THIS IS TO ADVISE YOU THAT CAPITOLA MALL IS PRIVATE PROPERTY AND HAS NOT BEEN DEDICATED TO PUBLIC USES. WRITTEN PERMISSION MUST BE OBTAINED FROM THE MANAGEMENT OFFICE TO USE THIS PROPERTY FOR ANY ACTIVITY OTHER THAN SHOPPING.

TO THE EXTENT YOUR ACTIVITIES ARE NOT BEING CONDUCTED IN ACCORDANCE WITH THIS CENTER'S TIME, PLACE AND MANNER RULES, YOU ARE CAUSING A DISTURBANCE AND INTERFERING WITH THE BUSINESS OF THE CENTER. YOU ARE HEREBY REQUESTED

TO STOP YOUR ACTIVITY OR LEAVE THE CENTER IMMEDIATELY.

IF YOU WISH TO APPLY FOR PERMISSION TO ENGAGE IN NON-COMMERCIAL EXPRESSIVE ACTIVITY, YOU MUST CONTACT THE CENTER MANAGEMENT OFFICE MONDAY THROUGH FRIDAY FROM 9:00 A.M. TO 5:00 P.M. THE TELEPHONE NUMBER OF THE CENTER MANAGEMENT OFFICE IS (831) 476-9616.

THANK YOU FOR YOUR COOPERATION.

EXHIBIT B

FREE SPEECH RIGHTS IN CALIFORNIA SHOPPING CENTERS

The shopping center is privately-owned and managed. In 1972, the United States Supreme Court held that shopping center owners were *not* required to allow individuals onto their property for purposes other than shopping. *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551. In 1980, the United States Supreme Court in *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, further held that since the California Constitution may require shopping centers to grant access to members of the public for purposes other than shopping, property owners may regulate Non-Commercial Expressive Activities through reasonable time, place and manner rules.

Following the decision in the *Pruneyard* case, several courts have ruled on the type of regulations which shopping center owners may legally enforce. These cases have held, for example, that owners may require that all persons wishing to engage in non-commercial expression apply to and obtain permission from the owner prior to commencing their activity. *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3d 1193. Owners may also restrict the time and location of the activity. *Savage v. Trammell Crow Company, Inc.* (1990) 223 Cal.App.3d 1562. Property owners may even completely prohibit some types of activity, such as solicitation of donations and sales of merchandise, *H-CHH Associates*, *supra*, and the staging of performances and demonstrations, *Westside Sane/Freeze v. Ernest W. Hahn, Inc.* (1990) 224 Cal.App.3d 546.

Union of Needletrades, Industrial & Textile Employees, AFL-CIO vs. Superior Court (Taubman Company) (1997) 56 Cal.App. 4th 996, confirmed that shopping center owners could require individuals and organizations to pre-apply and otherwise comply with Rules requiring insurance, identity of participants, identification of principal activities and prior submission of signs, leaflets, etc.

In accordance with these cases, the owner and manager of this shopping center have enacted Rules for Non-Commercial Expressive Activity. These Rules conform to the mandates of the California Constitution and the relevant case law. If you refuse to comply with the Rules of this shopping center, neither

the First Amendment nor any case gives you the right to engage in free speech activities in the shopping center. Violations of the Rules for this shopping center may give rise to a civil action and/or criminal prosecution against you.

CAPITOLA MALL
PUBLIC USE OF COMMON AREAS
SIGN-IN SHEET FOR ALL APPLICANTS AND/OR PARTICIPANTS

THE BELOW PARTICIPANT HAS CONTACTED ME AND AFFIRMED THAT S/HE HAS READ THE RULES FOR NON-COMMERCIAL USE OF COMMON AREAS AND AGREES TO ABIDE BY AND FOLLOW THE RULES.

DATE	NAME OF APPLICANT	NAME OF PARTICIPANT	NAME OF CENTER REPRESENTATIVE	CHECK-IN TIME	CHECK OUT TIME

CAPITOLA MALL
NON-COMMERCIAL EXPRESSIVE
ACTIVITY CHECKLIST

GROUP OR INDIVIDUAL CONDUCTING ACTIVITY:

_____

Date: _____ Time: _____

1. Does the participant have an approved application for the date on which the participant is engaging in the Activity?
   Yes _____ No _____
   (*If no, indicate in the Comments section below.*)

2. Is the participant in the Designated Area that has been assigned to him or her?
   Yes _____ No _____
   (*If no, indicate in the Comments section below.*)

3. Is the participant soliciting or accepting money, contributions or donations?
   Yes _____ No _____
   (*If yes, indicate in the Comments section below.*)

4. Has the participant placed any furniture in the Designated Area other than that approved by the Center?
   Yes _____ No _____
   (*If yes, indicate in the Comments section below.*)

5. Are there more than three (3) participants in the Designated Area? (Normally, no more than three (3) participants per Designated Area will be permitted.)
   Yes _____ No _____
   (*If yes, indicate in the Comments section below.*)

6. Is the participant interfering with patrons or tenants?
   Yes _____ No _____
   (*If yes, indicate in the Comments section below.*)

7. Is the participant creating any safety hazards or littering the Center?
   Yes _____ No _____
   (*If yes, indicate in the Comments section below.*)

8. Is the participant creating excessive noise, hawking or yelling?
   Yes _____ No _____
   (*If yes, indicate in the Comments section below.*)

9. Is the participant eating, drinking or smoking?
   Yes _____ No _____
   (*If yes, indicate in the Comments section below.*)

10. Is the participant damaging, defacing, destroying or removing any real or personal property belonging to the Center, its patrons or its tenants?
    Yes _____ No _____
    (*If yes, indicate in the Comments section below.*)

11. Is the participant neatly dressed and fully clothed?
    Yes _____ No _____
    (*If no, indicate in the Comments section below.*)

12. Are the participant's personal belongings stored neatly under the table, if any?
    Yes/not applicable _____ No _____
    (*If no, indicate in the Comments section below.*)

13. Does the activity engaged in by the participant constitute a performance, demonstration, sale of product, distribution of samples of products

which are similar to those offered by the Center and its tenants, or a survey which requests more information than the patrons' names, addresses or telephone numbers?
Yes _____ No _____
(*If yes, indicate in the Comments section below.*)

14. Does the activity identify by name the Center owner, manager or any tenant in the Center?
Yes _____ No _____
(*If yes, indicate in the Comments section below.*)

15. Is the participant using lights or loudspeakers?
Yes _____ No _____
(*If yes, indicate in the Comments section below.*)

16. Are signs, if any, posted in accordance with the Rules?
Yes/Not Applicable _____ No _____
(*If no, indicate in the Comments section below.*)

    (a) no more than two signs no larger than 22" x 28";

    (b) of a professional quality;

    (c) mounted or affixed to a table;

    (d) not blocking the view of any tenant's store or display and not directly competing with the business displays or logos of Center tenants or promotional activities; and

    (e) do not contain or depict fighting words, obscenities, pornography, grisly or gruesome displays, highly inflammatory slogans or materials likely to provoke a

disturbance, or racial, religious or ethnic slurs.

17. Is the participant carrying signs, posters or placards?
Yes _____ No _____
(*If yes, indicate in the Comments section below.*)

18. Is the participant with the furniture, if any, at all times? Furniture should not be left unattended for more than 10 minutes, unless permission has been granted.
Yes _____ No _____
(*If no, indicate in the Comments section below.*)

If the participant leaves furniture unattended for more than 10 minutes without permission, remove the furniture and store it. You should also inform the participant that he or she will not thereafter be allowed to use the furniture for the remainder of the day.

19. Have all participants checked in and checked out with the Security Office?
Yes _____ No _____
(*If no, indicate in the Comments section below.*)

COMMENTS:

Item No.	Violation (Provide details and individual's name where appropriate)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Date: _____ _____

Signature of Center Representative
or Security Personnel

_____

Print Name and Title/Position

TO BE PLACED ON
SHOPPING CENTER LETTERHEAD

Dear Applicant:

Enclosed please find a copy of your approved application to engage in Non-Commercial Expressive Activity at the Center. Please review the approval portion of the application to determine the date(s) and location of your Approved Activity. Prior to engaging in your Approved Activity, please also once again review the Center's Rules for Public Use of Common Areas, which you received with your original application.

Following is the check-in procedure which must be followed by all Participants prior to commencing any Approved Activity at the Center:

- *Each* Participant must check in at the Security Office *every* time he or she arrives at the Center to commence the Approved Activity.

- *Each* Participant must provide identification, in the form of a driver's license, state-issued identification card, or social security card.
- *Each* Participant must affirm that he or she has read the Center's Rules for Public Use of Common Areas ("Rules") and agrees to abide by the Rules.
- *Each* Participant must check in at the Security Office *every* time he or she finishes the Approved Activity for each day.

Failure to check in at the Security Office within thirty (30) minutes of the beginning of the approved time period for an Approved Activity will be considered an abandonment of the right to engage in the Approved Activity and will result in termination of the Applicant's right to use the Designated Area for the entire time period requested on the application.

The Center's Security Office is located . . .

If you have any questions, please contact the Center Management Office at (813) 476-9616

Very truly yours,

Enclosure

TO BE PLACED ON
SHOPPING CENTER LETTERHEAD

Dear Applicant:

Enclosed please find a copy of your recently submitted application to engage in Non-Commercial Expressive Activity at the Center. Your application has not been accepted. Please review the notation on the final portion of the enclosed copy of the application to determine the reason for the denial of your application.

If you believe your application was denied in error, please contact the Center Management Office. If you would like to submit a new application to engage in Non-Commercial Expressive Activity at the Center, you may obtain a new application by contacting the Center Management Office. Complete written applications must be received in the Center Management Office by 5:00 p.m. on the fourth business day preceding the date and time desired for the proposed activity. Only *original* applications will be accepted. Facsimile applications or photocopies will *not* be accepted. Hours of the Center Management Office are generally 9:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays.

The Center Management Office may be reached at (831) 476-9616.

Very truly yours,

Enclosure

CODE OF CONDUCT

Arden Fair Mall, including its parking lot, is private property. The following Code of Conduct is set forth for the purpose of protecting the Mall's legitimate business interests and any violation of the Code interferes with the commercial nature and function of the Mall. As a visitor on this property, you are prohibited from engaging in any of the following activities while on this property:

1. Using physical force, obscene language, obscene gestures, or racial, religious or ethnic slurs which are likely to create a disturbance or impinge on the hearing or peace of other patrons of the mall.

2. Physically or verbally threatening any person, fighting, annoying others through noisy or boisterous activities or by unnecessary staring, by following another person through the Mall or by using sexually explicit language or conduct, or in any other way creating a disturbance which interferes, disrupts or endangers the Mall's patrons or its commercial function.

3. Running, skating, skateboarding, bicycling, obstructing or interfering with the freeflow of pedestrian traffic or with other patrons' view of windows and other tenant displays, or assembling for the purpose of disturbing the peace or committing any unlawful act.

4. Creating litter, or throwing, discarding or depositing any paper, glass or other matter of any kind on the property, except in designated trash receptacles.

5. Defacing, damaging or destroying any real or personal property constituting part of or located in or on, the Mall and belonging to the Mall, its patrons, or its tenants, including writing, spraying, scratching or otherwise affixing graffiti on such property.

6. Bringing onto Mall property any animals, living or dead, with the exception of animals in the company of and trained to assist physically-challenged patrons of the Mall.

7. Yelling, screaming, singing, playing of musical instruments, radios or tape players, or otherwise communicating in a manner which creates noise of sufficient volume to impinge on the hearing or peach [sic] of other patrons of the Mall.

8. Engaging in non-commercial expressive activity without the proper written permission of the management of the Mall.

9. Soliciting money or other contributions or donations, or distributing commercial advertising or promotional material of any kind, or offering samples of items which are sold, available for sale, or available in exchange for a donation or contribution, except with the prior written permission of the management of the Mall.

10. Failing to be fully clothed, or wearing apparel which is likely to provoke a disturbance or embroil other groups or the general public in open conflict.

11. Sitting on floors, planters, handrails, stairs, escalators or trash receptacles.

12. Possessing any open can, bottle, or other receptacle containing any alcoholic beverage, except in areas specifically designated for the consumption of alcohol.

13. Loitering, delaying, lingering or remaining idle about the property without any useful business for being present.

14. Engaging in any unlawful activity or behavior.

If you fail or refuse to follow this Code of Conduct you will be asked to leave the property.

If you fail to refuse to leave the property you will be arrested and prosecuted for Criminal Trespass.

Code of Conduct

Welcome to Capitola Mall. We strive to provide an enjoyable and safe shopping environment for you, your family and our employees. Capitola Mall is private property. The Code of Conduct will be in effect at all times while visiting our mall. Persons violating these rules will be asked to leave the mall property. Those who continue to violate this Code will be subject to arrest.

Thank You for Shopping Capitola Mall

Ken J. Piotraschke
Director of Security

CAPITOLA [Logo] MALL
1855 – 41st St., Capitola, CA 95010
Phone 931.476.9616
A Macerich Company Property

The following activities *are not* allowed on Mall Property:

1. Physically or verbally threatening any person, fighting, annoying others through noisy or boisterous activities, unnecessary staring or stalking, or in any other way creating a disturbance which is disruptive or dangerous to others or the business activities of the Center.
2. Assembling for the purpose of disturbing the public peace or committing any unlawful act.
3. Using sexually explicit language, obscene gestures or racial, religious or ethnic slurs which

are likely to upset or disturb the peace of other shoppers.

4. Running, skating, rollerblading, skateboarding bicycling, or otherwise obstructing or interfering with the free flow of pedestrian traffic with patrons' view of windows or displays.

5. Failing to be fully clothed, or wearing apparel which is likely to provoke a disturbance or embroil other groups or the general public in open conflict.

6. Engaging in non-commercial expressive activities not in compliance with the Center's rules for such activities.

7. Soliciting money or other contributions or donations.

8. Defacing, damaging or destroying property in any area belonging to the Center, its patrons or tenants.

9. Throwing, discarding or depositing any paper, glass or other matter of any kind except in designated trash receptacles.

10. Bringing animals onto Center property, with the exception of animals in the company of, and trained to assist, physically challenged persons.

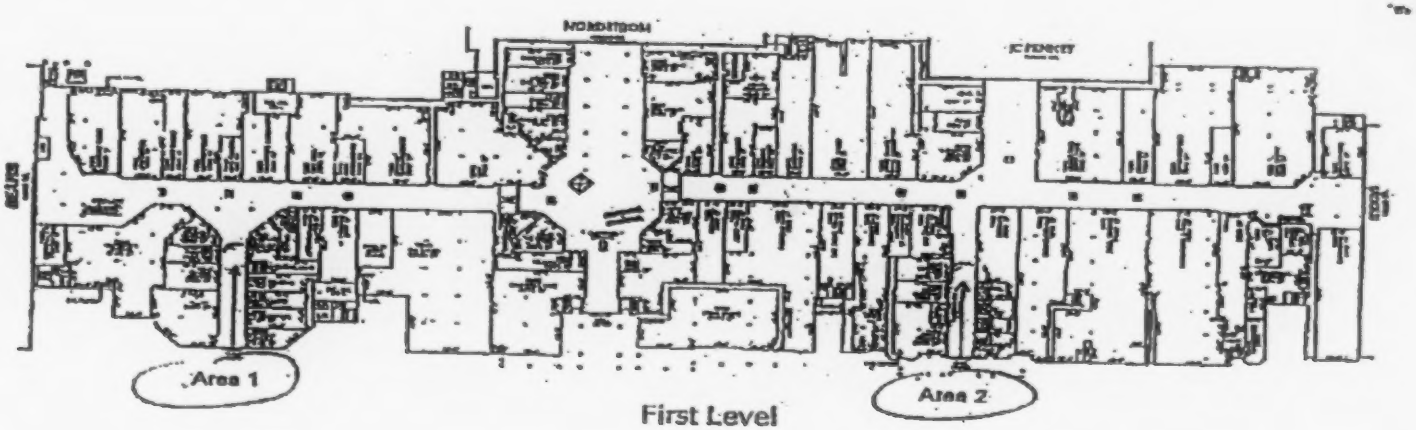
11. Possessing open cans, bottles or other receptacles containing any alcoholic beverage, except in businesses licensed to serve alcoholic beverages.

12. Smoking other than in designated smoking areas.

ARDEN FAIR

"It's Make Good Things Happen"

EXHIBIT 3



First Level

THIS IS A HANDBILL, TOO

CAPITOLA MALL'S dirty little secrets!!

While posing as a good community member,
behind the scenes Capitola Mall. . . .

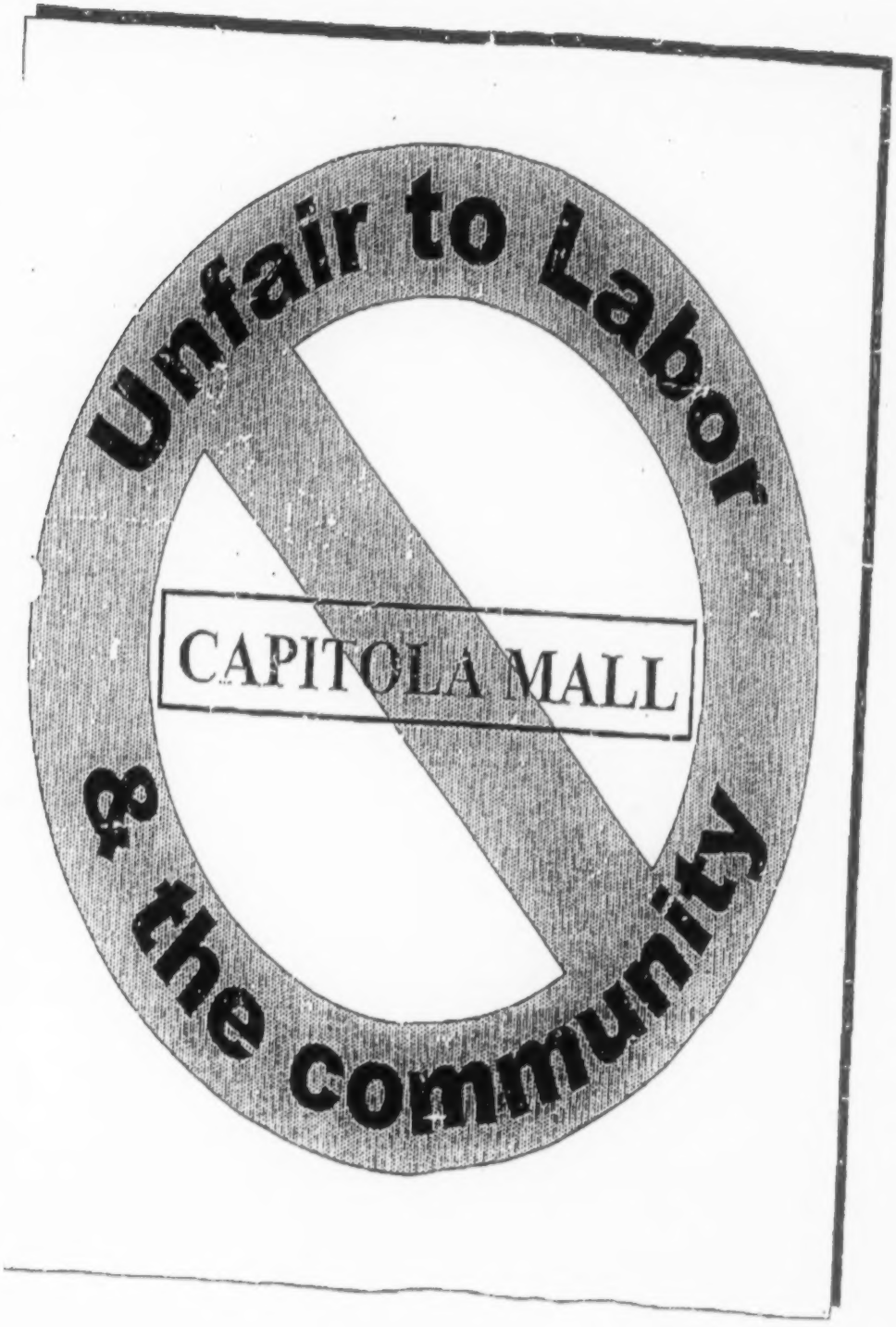
- Allows contractors without local business licenses to work at the Mall.
- Welcomes out-of-state contractors who import out-of-state workers;
- Welcomes contractors who undermine area wages and benefits
- Commits Unfair Labor Practices, in violation of Federal Laws

CAPITOLA MALL has the power to end these practices . . . but they won't ***unless you help!!***

We appreciate your support!! Carpenters L.U.505

This is not a strike against this establishment. We do not seek any work stoppages or refusal to make deliveries or to handle any goods.

THIS IS A HANDBILL, TOO



APPLICATION FOR USE OF COMMON AREAS OF ARDEN FAIR MALL

This application must be filled out completely and legibly. An incomplete or illegible application will be rejected. Copies of all required governmental licenses and permits must be attached to this application. Complete and legible copies of any audio-visual materials and the text, artwork and pictures on any handouts, flyers, petitions, signs, etc. must be attached. Any materials not attached to this application may not be used during the activity.

The information contained in this application will be kept confidential and will only be used by Center management in furtherance of its business activities.

Applicant's Name: Carpenters Lo. 586
Applicant's Address: 9261 Fulsome Blv. Sut 301
Sac. 95826

Applicant's Telephone No.: (916) 361-0995
Applicant's Fax No.: (916) 361-2352

If Applicant is an Individual:

- Driver's License, State-Issued Identification, or Social Security No.: _____
- Entity or Organization Sponsoring or Paying for Activities: ~~Carpenters Lo. 586~~
- Contact Person: _____

- Address: (P.O. Boxes are not acceptable.) _____
- Telephone No.: _____

If Applicant is an Group or Organization:

[If the Applicant intends to distribute leaflets, flyers, etc. related to any group or organization, the group or organization must be identified on all such materials.]

- Name of Group or Organization: Carpenters Lo. 586
- Representative's Name: Tom Brodsky
- Representative's Home Telephone No.: (916) 361-0995
- Representative's Fax No.: (916) 361-2352
- Driver's License, State-Issued Identification, or Social Security No.: E0463793

Names of Other Participants:

(All participants must be listed.) Various Carpenter Members

Subject Matter of proposed activity (i.e., topic – if multiple topics, identify each)

labor dispute

Type of proposed activity (e.g., leafletting, signature gathering, voter registration)

leafletting

If leaflets, flyers, etc. will be handed out, with submission of the application, the Applicant must either post a $50.00 refundable deposit by check or money order, or complete the indemnity agreement attached to this application.

Date and Time of most recent expressive activity at this Center:

Other locations, whether publicly or privately owned, at which the Applicant engaged in an expressive activity within the last twelve (12) months:

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Date and Location of three most recent applications at shopping centers:

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Date: _____ Location: _____
(Street Address & City) _____

Have you ever been denied access or had a similar application rejected? When? Where? Please explain circumstances:

No _____

_____

_____

Any previous injuries to persons or property while the Applicant was engaged in similar expressive activity:

Yes _____ No _____

If Yes:

Date: _____ Location: _____
(Street Address & City) _____
Injuries to Person or Property: _____

Date: _____ Location: _____
(Street Address & City) _____
Injuries to Person or Property: _____

Date: _____ Location: _____
(Street Address & City) _____
Injuries to Person or Property: _____

General Liability Insurance (if any):

Company: _____
Policy No.: _____
Broker's Name: _____
Broker's Address: _____
_____
_____

Broker's Telephone No.: _____

Failure to be covered by such insurance will *not* be cause for denial of this application, unless foreseeable risk warrants the need for special insurance.

Please list all permits and licenses obtained from any governmental agency concerning the proposed activity:

Please attach legible photocopies of all governmental permits and licenses.

Requested dates and times of activity: 12-16-99 – On

Preferred Designated Areas (in order of preference):
No map was provided

Number of individuals to be engaged in the activity at any one time: 1 2 3 10

Do you wish to use a table and chairs?

Yes _____ No X

For persons who claim their activities are authorized by the National Labor Relations Act or applicable state labor laws:

Are you an employee of a person or business engaged in work at this shopping center who has a labor dispute with your employer? If yes, please explain:

No

Are you an individual attempting to organize employees of persons or businesses engaged in work at this shopping center? If yes, please explain:

No

For persons who claim exceptions to any Rule(s) based upon a disability:

Please identify the relevant Rule(s) and the manner in which you are hindered by the Rule(s) due to your disability:

By making this application, I represent that I have read the Arden Fair Mall Rules for Public Use of Common Areas ("Rules") and agree to comply with all of the Rules and agree that all persons identified in the application agree to comply with the Rules. If this application is being made in the name of an organization or group, I represent that I am authorized to make this application in the name of the organization or group. I waive on behalf of myself and any other

persons on the property pursuant to this application any and all particular claims that result other than from Arden Fair Mall's gross negligence or intentional conduct.

I represent and warrant that all of the information contained in this application is true and correct.

Dated: 12-16-99 Amy Martin
Signature of applicant

Amy Martin, Esq.
(Print name and title of applicant)
Van Bourg, Weinberg, Reger & Rosenfeld

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of: **MACERICH MANAGEMENT COMPANY,** Respondent, and **UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, LOCAL UNION 586, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO** Charging Party	Case No. **20-CA-29636-1**
MACERICH PROPERTY MANAGEMENT COMPANY Respondent and **CARPENTERS UNION LOCAL 505, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO** Charging Party	Case. No. **20-CA-29918-1** **(Formerly 32-CA-18123-1)**

The above entitled matter came on for hearing pursuant to notice, before **Jay R. Pollack**, Administrative Law Judge, at **Hearing Suite 300, National Labor Relations Board, Division of Judges, 901 Market Street, San Francisco, California,** on **Tuesday, March 20, 2001,** at **9:11 a.m.**

* * *

[91] Q The purpose of sending Mr. Martino to leaflet at Arden Fair Mall was to discourage customers from shopping at Sears; is that correct?

[92] A Yes.

* * *

[99] Q Well, let me back up, let's do – I'll do this in order. Would you look at page 2 of General Counsel's Exhibit 4, please? Do you see under Roman numeral III.b, where it says that applications must be accompanied by legible copies of any and all items intended to be used?

A Are you talking page 2 of 6 or page 10?

Q Page 2, I'm sorry.

A And look under what, which one, III –

Q Roman numeral III.b.

A Okay. Yes.

Q So when you turned the application in on December 16th, it didn't have any fliers or any written materials; is that correct?

A Yes.

* * *

[101] Q In your declaration, on page 2, you say: "together with the Union's attorney, Amy Martin, we then completed this application." That's referring to the six-page application, which is part of General Counsel's Exhibit 4; is that correct?

A Yes.

Q What portion of that application did you complete and what portion did Ms. Martin complete?

A We both reviewed it and went over it, she filled it out, she signed it, I turned it in.

* * *

[109] Q BY MR. LEANSE: On December 21st, you and seven other people went to Arden Fair Mall wearing T-shirts that said "do not patronize Arden Fair Mall unfair to Carpenters;" is that [110] correct?

A Yes.

Q What was your reason for going to Arden Fair Mall on that day?

A To wear the T-shirts.

Q What was the purpose of the message on the T-Shirts?

A Not to patronize Arden Fair Mall.

Q So you were there for the purpose of discouraging people from shopping at Arden Fair Mall; is that correct?

A Yes.

* * *

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of: **MACERICH MANAGEMENT COMPANY,** Respondent, and **UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, LOCAL UNION 586, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO** Charging Party	Case No. **20-CA-29636-1**
and **MACERICH PROPERTY MANAGEMENT COMPANY** Respondent and **CARPENTERS UNION LOCAL 505, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO** Charging Party	Case. No. **20-CA-29981-1** **(Formerly 32-CA-18123-1)**

The above entitled matter came on for hearing pursuant to notice, before **Jay R. Pollack**, Administrative Law Judge, at **Hearing Suite 300, National Labor Relations Board, Division of Judges, 901 Market Street, San Francisco, California,** on **Thursday, March 22, 2001,** at **9:00 a.m.**

* * *

[506] Q BY MR. LEANSE: Was your purpose in going to Arden Fair Mall, on December 22, 1999, to purchase goods and services from the shopping center?

[507] A No.

Q Was it to go there to discourage people from purchasing goods and services at the shopping center?

A Yes.

Q And you went there with 44 other people, with the purpose of discouraging people from purchasing goods and services at Arden Fair Mall; isn't that correct?

A Yes.

* * *

[587] Q When you approached Mr. Wright on what we've identified as the second occasion, on March 21st –

A Yes.

Q – other than reading the statement of off General Counsel's Exhibit 16, did you say anything to him?

A I did read the statement and then he was pretty aggressive with me and he said something like why can't I be here, and I [588] can't remember if I said this before or after, but I was very nervous because he was at this aggressive level, I said something like – which I really didn't mean, but I said, you know, you can't be here because you're not paying rent, but I was just very nervous.

Q What do you mean by an aggressive level?

A He was, you know, just inches from my face –

* * *

JUDGE POLLACK: Continue, you were describing what occurred, tell us what happened?

THE WITNESS: Yeah, he was very aggressive and –

JUDGE POLLACK: Well, what did he say or do?

THE WITNESS: He was just saying that he had the right to be there and, you know, we couldn't stop him from being there, and they, you know, weren't going to leave, refused to leave.

Q BY MR. LEANSE: What was the level of his speech, was it in conversational tones?

[589] A No, it was borderline yelling.

Q What was the level of your speech?

A I was talking in normal tone.

Q Did you make an assessment as to whether or not there was a potential for violence at that point in time?

A I personally felt I might have been physically assaulted at any time. I was – I was afraid.

* * *

Q BY MR. LEANSE: And what did – what did you do after you first spoke with him?

A I read the prepared statement and then we contacted the police.

Q And then what happened?

A The police made an arrest.

Q And then what happened?

A They were processed and taken to, I believe, the county jail.

Q but all you know is that they were taken off the property; is that correct?

A Yes, I mean, that's all I know, I personally witnessed.

* * *

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of: **MACERICH MANAGEMENT COMPANY** Respondent, and **UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, LOCAL UNION 586, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,** Charging Party	Case No. **20-CA-29636-1**
MACERICH PROPERTY MANAGEMENT COMPANY Respondent and **CARPENTERS UNION LOCAL 505, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,** Charging Party.	Case. No. **20-CA-29918-1** **(Formerly 32-CA-18123-1)**

VOLUME II

The above entitled matter came on for hearing pursuant to notice, before **Jay R. Pollack**, Administrative Law Judge, at **Hearing Room 300, National Labor Relations Board, Division of Judges, 901 Market Street, San Francisco, California,** on **Wednesday, March 21, 2001,** at **10:20 a.m.**

* * *

[318] Q Okay, thank you. Now I'd like to direct you to General Counsel Exhibit 4. And I'd like you to look at – there is a section titled – section two entitled Definitions. And under that there is a paragraph (c) called Approved Activity, and a number of items that are said will not be approved. And listed under there are six items, and the sixth item reads, "Activities which identify by name the center owner, manager or any tenant in the center." You remember that rule?

A I see it.

Q And you or your staff enforced that rule during the time you were there?

A Yes.

Q And you can tell us the rationale of why the mall has this rule?

A Well, the center owner or the manager and the tenants in the center really need to be in control of any publicity and [319] advertising that's generated using their name. I mean, they really need to use their name to the benefit of the property and they

just can't allow someone else to represent them in any other situation.

* * *

[320] Q And you can explain to us what – first of all, what that entails. What does it mean, "interfere with the commercial purpose of the center"?

A Interfere with the commercial – The purpose of the center is to generate retail sales, and that's the whole reason for the center to be there and to be open, to open its doors for business. And anything that would interfere with that would be – makes no sense for the center to allow it to happen. Anything that would hurt our sales would hurt the tenant financially and hurt the owner of the property financially.

* * *

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: **MACERICH MANAGEMENT COMPANY,** Respondent, and **UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, LOCAL UNION 586, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,** Charging Party,	Case No. **20-CA-29636-1**
MACERICH PROPERTY MANAGEMENT COMPANY, Respondent, and **CARPENTERS UNION LOCAL 505, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,** Charging Party.	Case. No. **20-CA-29918-1** **(Formerly 32-CA-18123-1)**

VOLUME IV

The above entitled matter came on for hearing pursuant to notice, before **Jay R. Pollack**, Administrative Law Judge, at **Hearing Suite 300, National Labor Relations Board, Division of Judges, 901 Market Street, San Francisco, California,** on **Wednesday, March 28, 2001,** at **9:10 a.m.**

* * *

[664] and Southwest, and whatever. But there were scheduled meetings, with agendas, where department heads went to these meetings and spoke to the managers, marketing directors, leasing agents, the senior – the senior mall on-site staff people, or mall regional people, where Steve Spector, the gentleman who testified the other day, actually held a class on the policies and guidelines for each region, and I was in attendance for the first region, which was Northern California, and it was held – I believe it was in Carmel, and Steve Spector presented this and took questions and answers. I was at the other meetings throughout the – throughout the year and did not stay for that presentation. I was at the first one, saw what he did, and he usually was on the agenda right after I gave my presentation.

Q With respect to these rules, do you have an understanding as to the purpose of having rules at these properties?

A Uh-hum, I do.

Q And what's your understanding as to the purpose?

A My understanding is to protect the commercial activity of the center and to provide the customer with a shopping ambiance environment, and comfort that they expect when they come to a shopping center, to control activities so that you don't have 15 different organizations at one time, to protect the safety of those that are coming to the mall to present whatever activity that they're presenting, and to protect the people

* * *

[670] Q Now, one of the rules provides that activities which identify by name the center owner, the manager, or any tenant in the center will not be approved. What's your understanding for the reason for that?

A We need to protect our merchants, and our good name as, you know, the viable place to shop within your community. You know, we can't allow somebody just to come in and make a statement about us that could not be true.

Q I mean, the goal of the shopping center is to promote [671] business; is that correct?

A We are there to – we are open. We were built for a place for merchants to trade, and it's our responsibility to make sure that they can do business the way that they do business.

Q Is it your belief that if somebody comes in and engages in expressive activity and disparages the owner, the manager, or the tenant, that that somehow will have a negative impact on business?

A Yes, it could have a negative impact on business.

* * *

[675] Q There's a rule that states that signs, posters, placards, displays or written materials may not interfere with the commercial purpose of the center or its tenants. What's the reason for that?

A Because they are there to sell merchandise, and if people do not feel comfortable or are deterred from walking into a store because there's someone standing in front of it, or walking back and forth in front of it, they cannot go – have easy access to that center – or to that store, and the retailer won't do the business that he would normally do on that day.

* * *

[678] Q Now, you testified earlier that you were involved in the grand opening of a number of shopping centers. Have you also been involved in the grand reopening of shopping centers?

A Oh, yeah. Well, when I say grand openings, it includes that.

Q And what kinds of programs go on when you have a grand reopening?

A I'm doing one a week from this Friday night and Saturday morning, and I can tell you that I am spending $150,000 on this event, just for the addition of a food court and 30 retailers. It's a new wing of a mall that attaches a brand-new Macy's, and the existing mall. There will be a private party where we invite the community. We've invited – the invitation list was over 3,000 people to a party where there will be events all evening in the section that's not open, and then the next morning there's a whole day of activities that go all the way through Easter, for a week.

[679] Q And would you have expected that mall would have designated that grand opening period or grand reopening period as peak traffic –

A Peak traffic time.

Q The mall, itself?

A It better be or I'm going to be in a lot of trouble. We spend – we spend a lot of money in marketing and because it's very subjective, you know, corporate looks at those marketing dollars, and between the two malls that we're talking about today, I have budgets of $1.5 million so I have to make sure that those dollars are spent to encourage traffic, and it's an investment that both, you know, my company and the merchant makes, so I have to ensure that those dollars are well spent.

Q Is it your belief that if people come into the shopping center and engage in expressive activity

without complying with the rules, that that will have a negative effect on the shopping experience?

A Yes.

Q Can you relate any kinds of events which have occurred where people have not complied with the rules and what the ramifications have been?

A Yeah. I've had situations where a retailer brought in a recording artist and did not notify – properly notify the center, thus security wasn't notified in due time, and a radio station, you know, made an announcement that the person was [680] going to be at this mall and we found out about it from the radio – from a customer calling. We kept getting customer calls saying this person is going to be here, and we kept saying, no, they're not going to be here. They're not going to be here, we didn't schedule it, and the person arrived and, you now, there were thousands of kids. In my past experience I've had events come in the mall that we did not know about and, you know, a small child got hurt by an animal that was brought into the mall. I mean, just things that happened that we were not made aware of, there were no forms filled out.

* * *

[681] Q And do you have an understanding as to what the experience is of Macerich Property Management and Macerich Management with the types of activities that come in pursuant to these rules?

MS. HILLMAN: I'm going to object to being general. Can we focus on Arden Fair and Capitola, and not the malls in general.

MR. LEANSE: Well, Your Honor, I believe that the testimony is that these policies are effectively the same at all of the properties that are managed by these two companies in California and, therefore, the rationale is broader.

JUDGE POLLACK: You can go ahead.

MR. LEANSE: Thank you.

THE WITNESS: Okay. I can tell you specifically on the two malls some of the things that have been applied for. In [682] Northern California, which includes these two malls, about between 60 to 70 percent, depending on the mall, of the applications are for voter registration, for information on, you know, ballot items, religious concerns, and health related. And I know that at Capitola and Arden, both of them most of them were voter registration, League of Women Voters, and health relate, and I think both of them – to the best of my knowledge, both of them had one religious organization that was accepted.

* * *

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(5)

No. 09-235

Supreme Court, U.S.
FILED
SEP 25 2009
OFFICE OF THE CLERK

In the

Supreme Court of the United States

MACERICH MANAGEMENT COMPANY, et al,

Petitioners,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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Center for Constitutional Jurisprudence

QUESTION PRESENTED

Whether a state law requirement for property owners to open their property for use by individuals and organizations to advocate directly against the economic interests of the owners violates the First and Fifth Amendments to the United States Constitution?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of freedom of speech and the individual rights in property.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005), *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, No. 08-1151 (U.S. filed Mar. 13, 2009) and *Citizens United v. Fed. Election Comm'n*, No. 08-205 (U.S. filed Aug. 14, 2008).

The Center believes the issues before this court in the petition for writ of certiorari raise critical questions going to the foundation of individual liberty—the right to put one's private property to a particular use and the rights of freedom of

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

conscience. The Founders viewed these subjects as inseparable and both freedoms suffer when courts attempt to separate them as was done by the California decision that forms the basis for the decision below.

REASONS FOR GRANTING THE PETITION

California has expanded the *state constitutional* speech rights of one interest group (labor unions seeking to urge a boycott), but at the expense of the *federal constitutional* speech and property rights of others (property owners). Amicus well understands the importance of federalism, and often files briefs in this Court supporting a strong federalist interpretation of the Constitution. On the other hand, amicus also understands that states are not free to expand state-granted rights by constricting rights guaranteed by the federal constitution. Review by this Court is required to strike the proper balance between the individual rights in property and freedom of conscience guaranteed by the United States Constitution and the state-created and expanded rights of speech that convert private property into public foray.

Underlying the decision of the court below is the recent ruling of the California Supreme Court dramatically expanding the state-created rights to engage in speech activities on the private property of others. In *Robins v. PruneYard Shopping Ctr.*, 23 Cal. 3d 899 (Cal. 1979), the California Supreme Court ruled that shopping mall owners could not forbid private groups from soliciting petition signatures or distributing pamphlets at the mall. *Id.* at 910. The pamphleteers in that case sought to engage mall patrons on a social-political issue

unrelated to the mall or its tenants. *Id.* at 902. In so holding, the California Supreme Court repeated its rhetoric from an earlier decision to the effect that constitutionally protected individual rights "are held in subordination to the rights of society." *Id.* at 906.

Acting on that philosophy, the California Supreme Court in *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850, 854-55 (Cal. 2007), ruled that mall owners also must suffer the presence of protestors for the purpose of urging a boycott of the mall and its tenants. This ruling provided the basis for the Ninth Circuit ruling that Macerich Management Company's removal of union protestors was an invalid time, place, and manner restriction. *United Brotherhood of Carpenters & Joiners of America Local 586 v. NLRB*, 540 F.3d 957, 973 (9th Cir. 2008).

California's ruling keeps it the leader of just five other states in determining private property owners must permit third party speech. *Fashion Valley Mall*, 42 Cal. 4th at 875-76 (Chin, J., dissenting); *see also* Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 391-92 (2009). But the *Fashion Valley Mall* ruling represents a dramatic expansion in the state rule that private property owners must donate space on their land for speech activities. Instead of speech unrelated to the commercial interests of the property owner, the mall must now host speakers who seek to put it out of business. This holding enters an area unsettled in federal jurisprudence, as the holding in *PruneYard Shopping Ctr. v. Robins* only dealt with third-party advocacy of interests unrelated to the

commercial interests of the shopping mall owner. 447 U.S. 74, 77 (1980). Review by this Court is necessary to preserve the liberties that formed the basis of the nation's founding.

I

INDIVIDUAL RIGHTS IN PROPERTY WERE VIEWED AS THE BASIS FOR ALL OTHER INDIVIDUAL LIBERTIES

The California *PruneYard* decision rests in part from a state decision for the 1920's that elevates the collective rights of society over individual rights. Whether or not such experimentation with different balance between collective and individual rights is good policy, it is clear that the states may not expand collective rights at the expense of individual rights protected by the federal constitution. This Court must act to protect those rights—especially the individual right to property.

The right to property—to control, use, and exclude—is not only rooted within the Constitution, *see* U.S. Const. amend. V, XIV, but it is part and parcel with the first principles of republican government. Justice Stewart summarized the philosophic and constitutional harmony between property rights and all other rights:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. *In fact, a fundamental interdependence exists between the personal*

> *right to liberty and the personal right in property.* Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citations.]

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (emphasis added). Justice Stewart, in his citations, draws on the original understanding of property rights at the American Founding, citing, among others, John Locke and William Blackstone.

As Professor Harry V. Jaffa, a preeminent scholar of the American Founding and Civil War, noted, "For [President] Lincoln (following the Founding Fathers), the origin of the right of property, antecedent to civil society, was the natural right of every man to own himself and thus to own the product of his labor." *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* 320 (2000). The Founders recognized that an individual's "dominion over his property is absolute because" all persons have dominion over themselves and their own faculties. *Id.* at 24.

The colonists brought their views of individual rights in property with them from England. William Blackstone noted that the right to property is an "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries on the Laws of England* 135 (Univ. of Chicago Press 1979) (1765) .

This view that individual rights in property were the key to other personal rights was recognized

by the Founders as being a primary concern of government. James Madison commented on the compelling importance of protecting property rights and human faculties: "The protection of these faculties is the *first object* of government. From the protection of different and unequal faculties of acquiring property, the possession of the different degrees and kinds of property immediately results." *The Federalist No. 10*, at 74 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The differing and diverse "faculties of men," from which property rights "originate," require protection from unjust interference by both government and private action. *Id.*; *see also The Federalist No. 70*, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (expressing the need for a strong executive for the "protection of property" and "security of liberty").

The Founders believed that individual rights in property are the basis for all other rights, whether it is speech, religion or any other right held by individuals. John Adams emphasized, "Property must be secured, or liberty cannot exist." *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Madison summarized this view as a person has a right to property and also property in his rights:

> A man's land, or merchandize, or money is called his property. A man has property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions . . . he has a property very dear to him in the safety and liberty of his person.

James Madison, *On Property*, Mar. 29, 1792, *in* 14 THE PAPERS OF JAMES MADISON 266-68 (William T. Hutchinson et al. eds., 1977). John Rutledge, delegate of South Carolina, argued that "property was the main object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Ferrand ed., Yale Univ. Press rev. ed. 1937). Hamilton remarked that, without this "main object," "adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973).

The primary "object of government" is to protect the property rights—physical and intellectual—of every American, especially when the laws promote interference with these rights. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.") (Opinion of Chase, J.). The right to property is the civil and natural right that protects and guarantees all other rights. As Justice Stewart pronounced, the "interdependence" between these two rights requires protection for both, without either losing to the other. *Lynch*, 405 U.S. at 552. And from the original understanding of property rights, it certainly "is wrong to compel a private property owner to allow an activity that contravenes the property's purposes." *Fashion Valley Mall*, 42 Cal. 4th at 870 (Chin, J., dissenting).

To be sure, the State of California is free to dispense with any "extra" state law protections of

property that it has granted in order to promote the collective interests of society. It may not, however, dispense with rights guaranteed by the federal Constitution that the Founders considered essential to the protection of all individual liberty. Those federally guaranteed individual rights in property and freedom of conscience are endangered by the California ruling and the Ninth Circuit decision below that is based on that state ruling.

II

CALIFORNIA'S EXPANSIVE SPEECH MANDATE RAISES IMPORTANT FIRST AMENDMENT QUESTIONS UNANSWERED BY *PRUNEYARD*, AND HAS THUS DISRUPTED KEY FIRST AMENDMENT PRINCIPLES

In *PruneYard*, this Court held that the federal Constitution does not prevent a state from requiring a shopping mall owner to allow third-party speech where that activity will not "impair the value or use of [the] property as a shopping center." 447 U.S. at 83. Justice Powell wrote in his concurrence that some of the language of the Court's decision raised troubling questions: "In my view, state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." *Id.* at 97 (Powell, J., concurring). The questions that concerned Justice Powell have come to fruition in this case.

Justice Powell cited the Court's ruling in *Wooley v. Maynard*, 430 U.S. 705 (1977), as one provoking questions for the result in *PruneYard*. In *Wooley*, this Court ruled that the state could not compel

motorists to host the state's political message on their private automobiles. *Id.* at 714. As Justice Powell noted, "I do not believe that the result in *Wooley v. Maynard, supra*, would have changed had the State of New Hampshire directed its citizens to place the slogan "Live Free or Die" in their shop windows rather than on their automobiles." *PruneYard*, 447 U.S. at 97 (Powell, J. concurring in part and in the judgment). Justice White also concurred in the *PruneYard* decision, but joined Justice Powell's concurrence and added his own cautionary note:

> I concur in this judgment, but I agree with Mr. Justice Powell that there are other circumstances that would present a far different First Amendment issue. May a State require the owner of a shopping center to subsidize any and all political, religious, or social-action groups by furnishing a convenient place for them to urge their views on the public and to solicit funds from likely prospects? Surely there are some limits on state authority to impose such requirements.

Id. at 95 (White, J., concurring in part and concurring in the judgment). Those limits that Justice White believed would be required in a future case are certainly tested in this action. A review of the Court's cases considering "compelled access" demonstrate how far afield the California decision has gone and the danger it presents to individual rights in property and speech.

In *Miami Herald Publ'g Co. v. Tornillo*, the Court was faced with the issue whether a Florida

law may require a newspaper to allow a politician, free of charge, to place within the newspaper a reply to any criticism the newspaper published against said politician. 418 U.S. 241, 243 (1974). The Court first held that the "statute exacts a penalty on the basis of the content of a newspaper." *Id.* at 257. Space that would otherwise be used by the newspaper for other substance—advertisements, promotions, or other articles—is then used for speech of a third party. *Id.* The Court then found that "the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* The Court concluded that the state may not require the newspaper to hold open its pages for the views of others.

Later, in *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 5-7 (1986), the Court dealt with the issue of a California requirement that a utility company allow a consumer group to put its leaflet in the utility's billing statement mailed out to customers. Interpreting *Tornillo*, the Court observed that "compelled access" is impermissible under the Constitution. *Id.* at 11-12 (plurality opinion). It is simply an infringement of the owner's First Amendment rights that the owner "is still required to carry speech with which it disagreed, and might feel compelled to reply or limit its own speech in response to" the third party's speech. *Id.* at 12 n.7.

Wooley, *Tornillo*, and *Pacific Gas & Electric*, take a different path than the one blazed in *PruneYard*. Seen in this context, *PruneYard* does not serve to enhance individual liberty—it instead restricts that liberty. The decision below, however,

allows a significant expansion of *PruneYard*, so that the property owner must now hold its property open to those who "will unreasonably impair the value or use of their property as a shopping center." *PruneYard*, 447 U.S. at 83.

CONCLUSION

The ruling by the Supreme Court of California endangers the "first object of government," *The Federalist No. 10*, at 74, that a private property owner truly owns private property. The questions that concerned Justice Powell are raised in this case as is the need for limits foreseen by Justice White. This Court should grant review in order to protect

the federally guaranteed rights in property and speech.

DATED: September, 2009.

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No. 09-235

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In The Supreme Court of the United States

MACERICH MANAGEMENT COMPANY and MACERICH PROPERTY MANAGEMENT COMPANY,

Petitioners,

v.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS, LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Amici Curiae make the following disclosure:

International Council of Shopping Centers ("ICSC") is a not for profit corporation organized under the Not for Profit Corporation Law of the State of Illinois. ICSC does not have a parent corporation, nor does a publicly held corporation own any of its stock.

California Business Properties Association ("CBPA") is a non-profit corporation organized under the Non-Profit Corporation Law of the State of California. CBPA does not have a parent corporation, nor does a publicly held corporation own any of its stock.

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INTEREST AND IDENTITY OF AMICI CURIAE[1]

International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry with over 60,000 members worldwide, of which over 50,000 are in the United States and over 9,000 are in the State of California. Founded in 1957, its members include developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry. ICSC's members own and manage more than 13,750 shopping centers in the State of California. In 2008, these California centers accounted for $322.1 billion in retail sales. That same year, these centers employed more than 1,528,885 persons, constituting 11.9% of the total nonagricultural employment in the state, and contributed $20.1 billion in state sales tax revenue.

California Business Properties Association ("CBPA") has over 12,000 members and has served and represented retail, commercial and industrial property owners in California for thirty-seven years. CBPA members include numerous shopping center owners, property managers, large retailers and

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[1] All counsel of record received notice of Amici's intention to file this brief at least ten days before this brief was due and Amici has received consents from all. Such consents are lodged with the Court. Amici state that no portion of this brief was authorized by counsel for a party and that no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

associated professionals. Additionally, ICSC is also a member. CBPA is also the designated legislative advocate for California Chapters of the National Association of Industrial and Office Properties ("NAIOP"), Institute of Real Estate Management ("IREM"), Building Owners and Managers Associations of California ("BOMA"), Retail Industry Leaders Association ("RILA"), California Downtown Association ("CDA"), Commercial Real Estate Women ("CREW"), Association of Commercial Real Estate-Southern California ("ACRE"), and Certified Commercial Investment Members Institute ("CCIM"), making CBPA the recognized voice of the commercial, industrial and retail real estate industries in California, as well as the largest consortium of commercial real estate professionals in California.

ICSC's and CBPA's interest in this case relates to those portions of the decision that render ineffectual certain long-standing and existing time, place and manner rules for shopping centers. Additionally, this decision severely restricts a shopping center owner's ability to regulate public access in its center in manners that detract from its and its tenants' central purpose, which is to operate a commercial business establishment. Protecting a center's existence as a commercial enterprise is of prime concern to ICSC and CBPA members who own, operate, manage and occupy such property.

DECISION BELOW

The opinion is reported at *United Brotherhood of Carpenters & Joiners of America v. NLRB*, 540 F.3d 957 (9th Cir. 2008). ICSC and CBPA refer the Court to the Brief of the Petitioners for a statement of the facts of the case and that statement is incorporated by reference.

ARGUMENT

In 1980, when this Court accepted the California Supreme Court's interpretation of the California Constitution to permit public access for the purpose of political petitioning on the private property of a shopping center, it did so subject to a property owner's right to impose reasonable time, place and manner restrictions. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) ("*PruneYard*"). At that time, the court did not view a handful of young people asking for signatures on a petition to a governmental representative as a significant interference with the business purpose of the shopping center owner; the court could not have foreseen the unintended consequences of its decision almost thirty years ago.

One such consequence is evident from the decision in this particular case; it not only requires a property owner to donate the use of its shopping mall common area to any protestors, picketers, petitioners and other such ideologues who demand the right to espouse their "constitutional free speech rights" (free

of payment and/or regard to the private property owner's own beliefs), but now, free of reasonable regulations that owners have relied upon for years.

Providing unfettered access to a shopping center property without such reasonable controls, especially for the purpose of interfering with the economic and commercial purpose of that shopping center severely diminishes any expectation of an economic return on its investment by the property owner, its tenants, and even its potential tenants. Who would spend millions of dollars developing bare land into a shopping mall for the purpose of dedicating its use to anyone who has a cause or agenda to espouse, particularly when that agenda consists of trying to cause that shopping center business (or the business of its tenants) to fail? Who would want to be part of that shopping center as a tenant?

Another unintended consequence of this particular case is the conflict that has been created by the decision. Since the decision favors labor unions, are certain regulations only applicable to those who are not members of a labor union? So, if you are a member of a labor union, no such regulations apply? This is a conflict that needs to be resolved as certainly this is not equal treatment under the law. The further dilemma of the private property owner requires a decision as to which part of the conflict he or she may have to resolve. Without the past guidelines to rely on and the creation of these conflicts, the private property owner has effectively been deprived

of the economic control of its property, a consequence that is neither protective nor equal to that owner.

CONCLUSION

The opinion in the case at bar drastically restricts and/or eliminates a property owner's ability to impose such reasonable regulations (based on long-standing guidelines) on the use of his or her property by persons who are not there to shop, but instead, to espouse their own ideological agenda which can include (pursuant to the case at bar) urging customers not to patronize the business and stores in the shopping center, all to the economic detriment of the private property owner and its tenants/occupants.

By interpreting California's free speech clause more broadly than that of the United States Constitution, this decision strikes a fatal blow to the private property owner's own First, Fifth and Fourteenth Amendment rights under the United States Constitution and significantly affects all members of ICSC and CBPA. This decision further sets a trend in the wrong direction strongly departing from *PruneYard*, especially at a time when a traditional public forum (as established by *PruneYard*) is no longer necessary. The idea of replacing the soap-box in a public square with a shopping center common area is not as important or unique as it may have been when *PruneYard* was originally decided, as many other available alternatives, such as new technology and

the internet, including e-mails, texting and other social networking media, all provide easier, cheaper and broader forms of communication.

A private property owner should not be prevented from reasonably controlling and regulating the conduct of those unrelated and uninvited third parties that come onto that property for purposes other than what was intended, developed and paid for by the private property owner. To prevent the private property owner from imposing reasonable restrictions on "free speech" activities of all parties coming onto its property, especially where the private property owner believes subjectively (and reasonably) that such parties will disrupt its own, its tenants' and its patrons' use of the property and/or (as in this case) interfere with the business of the shopping center by advocating a boycott of the business of the center, effectively results in the private property owner donating its property to subsidize the third party's ideology.

Additionally, a private property owner's own free speech right is impaired as one should not be required to speak, to defend, to answer, to respond or be intimidated or implicated in doing so by the fact that unrelated parties, being permitted to espouse their own ideas on that property owner's private property, can impute such statements onto the owner. The private property owner is forced to permit such ideologues and their views to be propounded on its

own property, regardless of whether or not such are the views of the private property owner.

Finally, to permit such state rights of the unrelated third parties to be elevated above the private property owner's own federal rights is in violation of the Supremacy Clause of the Constitution of the United States.

Amici believe that the time has come for this Court to restore to the private property owner his or her constitutional rights by reviewing and reconsidering the *PruneYard* holding and this decision in light of current technology and availability of other means for parties to espouse their "free speech" without using, for free, the private property of others.

For all of the reasons set forth above, Amici respectfully request this Court to grant certiorari.

DATED: September 23, 2009

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UNITED BROTHERHOOD OF CARPENTERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that states may require private shopping malls to allow public access to the malls' common areas for purposes of engaging in expressive activities. The expressive activity at issue in *PruneYard*—soliciting signatures for a political petition—was in support of a cause that the mall owners did not oppose and that did not conflict with the mall's commercial interests. The present case raises the following questions, unanswered by *PruneYard*:

1. Does a state law requirement that a private shopping mall provide access for expressive activity violate the mall owners' property rights under the Fifth Amendment where the activity—here, urging patrons to boycott the mall and its stores—conflicts with the mall's commercial interests?

2. Does a state law requirement that a private shopping mall provide access for expressive activity violate the mall owners' First Amendment free speech rights where the expressive activity supports a cause the mall owners oppose?

3. Should *PruneYard* be overruled?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.[1]

PLF is the largest and most experienced nonprofit legal foundation of its kind. PLF litigates at all levels of state and federal courts in defense of private property rights, and participated as amicus curiae in *PruneYard v. Robins* both in this Court (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)) and in the California Supreme Court (*Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899 (1979)), as well as many subsequent cases seeking to apply *PruneYard*. *See e.g.*, *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 535 U.S. 905 (2002); *Golden Gateway Center v. Golden Gateway Tenants Association*, 26 Cal. 4th 1013 (2001); *Cross v. Texas*, 2004 WL 1535606 (Tex. App. Ct.-El Paso). PLF attorneys also have published on the subject of First Amendment rights. *See, e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case Western Res. L. Rev.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

1205 (2004), and Deborah J. La Fetra, *Recent Developments in Mandatory Student Fee Cases:* 10 J. L. & Pol. 579 (1994).

SUMMARY OF REASONS FOR GRANTING THE PETITION

Certiorari is warranted here to revisit and to overrule this Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). That case was wrongly decided on both First and Fifth Amendment grounds. Subsequent decisions by this Court have undermined its rationale and have striven unconvincingly to distinguish or limit *PruneYard*. The decision has been criticized by several state courts and by legal commentators. This Court has also recharacterized its First Amendment analysis and distinguished *PruneYard* repeatedly in subsequent decisions. *PruneYard* meets the criteria for determining when a decision should be overruled. This is the appropriate case for revisiting and setting straight this important area of law.

ARGUMENT

I

THE COURT SHOULD GRANT CERTIORARI TO REVISIT, AND OVERRULE, *PRUNEYARD v. ROBINS*

PruneYard is a prime example of the inherent relationship between private property rights and other kinds of rights, and an apt illustration of the framers' belief that private property rights are "the guardian of every other right." James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 26 (2d ed. 1998) (quoting Arthur Lee).

Private property consists of a realm of autonomy that extends to physical objects or places, and includes an owner's right to bar others from entering the owned property. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This ability to exclude is essential to the freedoms of speech and association because freedom of expression and the right to exercise the prerogatives of ownership are fundamentally identical: they represent realms of individual free choice which other individuals, and the government, must respect. *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1188 (2008); *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

This Court's precedent has recognized the connection between ownership and expression rights. Thus, states may not force individuals to contribute money to the propagation of opinions with which they disagree, whether those opinions be political, religious, or even commercial. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Keller v. State Bar of California*, 496 U.S. 1, 9-10 (1990); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977). Indeed, in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972), and *Hudgens v. N.L.R.B.*, 424 U.S. 507, 517-21 (1976), this Court explicitly held that the First Amendment does not entitle individuals to express themselves at privately owned shopping malls without the owners' consent. Such cases are consistent with the "essential principle" that "[i]ndividual freedom," including freedom of expression, "finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

Nevertheless, *PruneYard* allowed California state law to force mall owners to allow speech on their property, depriving these owners of their property right to exclude. *See* 447 U.S. at 82. It also deprived the owners of their First Amendment right not to subsidize the propagation of opinions which they do not wish to express. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713 (1977) ("[T]he State may [not] constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property."). This case is the proper vehicle for reinforcing the fundamental connection between private property and freedom of expression by revisiting the *PruneYard* case and overruling it.

A. PruneYard's Takings Clause Analysis Was Incoherent and Has Since Been Abrogated

The basic flaw in *PruneYard*'s takings analysis lay in the confusing overlap of the principle of "investment-backed expectations" with more fundamental, categorical principles that define the foundations of property rights. The *PruneYard* Court acknowledged that "there ha[d] literally been a 'taking'" of the mall owners' right to exclude. 447 U.S. at 82. This should have ended the takings analysis. But the Court proceeded to apply the vague multi-factor test employed when property is subjected to regulations diminishing its value. *See id.* at 82-83. The errors in this approach were manifold.

First, a law requiring a property owner to submit to a trespass is a compensable taking regardless of the time period involved. This is because, unlike some regulatory diminutions in value, a trespass is a discrete incident which can be readily separated into a

single, compensable "stick" for purposes of compensation.

When regulations eliminate part, but not all, of a property's use, courts have struggled with the problem of determining whether to treat that property as composed of segments, each of which is separately compensable, or whether to treat it as a unified whole, the total value of which has merely been diminished. *See, e.g., Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 889 n.5 (5th Cir. 2004). But a trespass is by nature a particularized, all-or-nothing intrusion, readily divisible from other incidents of or burdens on ownership. For this reason, property owners can sell the right to enter property at a particular time and place—as when an amusement park sells admission tickets. Each trespass permanently and totally deprives the owner of a particularized property right. Trespasses are therefore susceptible of *per se* treatment rather than the more *ad hoc* balancing approach used in regulatory takings cases. *See* Steven Eagle, *Regulatory Takings*, 823-24 (3d ed. 2005) (compensation should be awarded for the appropriation of any property interest for which there is a "ready market"); John E. Fee, *Comment: Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994) (compensation should be awarded for the taking of "any identifiable segment of [property] . . . if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding [property] segments.")

In *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003), this Court found that a categorical analysis was appropriate for determining whether the confiscation of interest on legal trust accounts was a

taking under the Fifth Amendment. Such appropriations were "more akin to the occupation of a small amount of rooftop space in *Loretto*," *id.* at 217-18, in part because they are takings of discrete and readily quantifiable property interests, as opposed to the situation where a law imposes a broad diminution in the value of a whole bundle of rights. Likewise, a deprivation of an owner's right to exclude, even though brief relative to the life span of the property, is nevertheless a compensable taking of a particular right.

Second, the *ad hoc*, fact-intensive analysis of *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), should not apply to trespasses. That approach is justified on the grounds that restrictions on property rights are often complicated by various economic factors: whether a regulation (rather than other dynamic economic factors) actually diminishes the property's value, whether the property owner actually expected to use the property in the relevant respect, whether the owner actually possessed the right to use the property that way (or whether such uses were already barred by "background principles" of state law, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)), are factors that require a complicated, fact-intensive approach. But a trespass is a clearly recognizable, categorical matter. By treating forced trespasses only as a diminution of value, *PruneYard* ran counter to the overwhelming history of the common law, which regarded trespasses as a unique category of property infringement. The common law treats trespasses as a special kind of harm, to be remedied by both damages and injunction, and without requiring the plaintiff to prove the value

of his injury. *See Restatement (Second) of Torts* § 162 (2009).

Although *Loretto* held that forced trespasses are *per se* takings, that case distinguished *PruneYard* on the grounds that the mall owners were not required to submit to a *permanent* trespass; purportedly categorically distinct from temporary ones. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982). But the Court subsequently acknowledged that temporary takings of discrete property rights are "not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318 (1987). Moreover, because trespasses are deprivations of discrete property rights, they are not "normal delays" diminishing a whole property's general market value, like laws requiring building permits, zoning variances, or rules "prohibiting access to crime scenes, businesses that violate health codes, [or] fire-damaged buildings." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002). Rather, they are total confiscations of particular property rights.

Third, *PruneYard*'s application of the *ad hoc* balancing approach led to some bizarre conclusions. The Court, for example, concluded that the mall owners' right to exclude was not "essential to the use or economic value of their property." 447 U.S. at 84. Yet the right to exclude is part of the definition of property rights; it is not simply an item to be weighed in valuing that property. In *Loretto*, the trespass had a minute impact on the economic value of the property,

but the Court did not weigh that against other factors. And in *Kaiser Aetna*, the property owners made no showing "that opening the marina to members of the public would unreasonably impair its value or use; at least the Court made no mention of any such showing." Gideon Kanner, *Hunting the Snark, Not the Quark,* 30 Urb. Law. 307, 321 (1998).

Moreover, the right to exclude is *essential* to the economic value of shopping centers that depend heavily on their ability to control access to their land. A major factor in attracting customers is the ambience created by the management's choices of including and excluding particular uses, thus fostering feelings of comfort, security, and enjoyment for consumers. "[M]any individuals patronizing these facilities seek an oasis in their hectic lives and wish to shop or spend their family time in private facilities away from the public spaces that are for some liberating but for others threatening." Eagle, *supra*, at 515.

Shopping mall owners regularly and strongly assert their property rights against the *PruneYard* rationale, because it obstructs their ability to provide the type of atmosphere necessary to the successful operation of a shopping mall. *See, e.g., Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 357 n.47 (Mich. 1985) ("The malls argue . . . that mandated political access would impose unreasonable harm on shopping centers."). Indeed, with petition circulation becoming an increasingly economic enterprise, and paid petition circulators aggressively targeting shoppers for signatures, owners have been forced to undertake greater efforts to maintain control over their properties. *See* Mike McKee, *Shopping for Trouble: Stores Increasingly in Court To Send Solicitors*

Packing, San Francisco Recorder, July 12, 1999. Under *PruneYard,* these owners suffer not only unwanted entries onto their property, but also from frequent lawsuits that test the boundaries of their right to exclude.

Many shopping centers have taken drastic steps to bar unwanted intrusions on their property, and yet doing so is often a complicated and delicate process. In 2004, Target (a common anchor store in shopping centers) announced it would not allow Salvation Army "bell ringers" on its property during the Christmas shopping season, because the company determined that it could not legally allow the Salvation Army while barring other solicitors. *See* Dan Benson and Peter Malier, *Target Bans Salvation Army Kettlers,* Milwaukee Journal Sentinel, Oct. 18, 2004 (2004 WLNR 17251123). The company's spokeswoman explained, "if we continue to allow the Salvation Army to solicit, then it opens the door to other groups that wish to solicit our guests." *Id.* The decision was highly unpopular with consumers and led to protests against Target; its competitor, Wal-Mart, took the opportunity to promote its willingness to allow Salvation Army solicitors—but only for two weeks per year and for no more than three consecutive days. Rick Cohen, *Target v. Salvation Army? It's About More Than Just Bell Ringers*, Non-Profit Times, Feb. 1, 2005 (2005 WLNR 26459515). These companies would prefer to allow Salvation Army collectors on their property while barring other solicitors who offend customers or oppose the businesses themselves, but current law does not allow them to exercise their property rights in that fashion.

Reducing the ability of shopping mall owners to exclude unwanted speakers from their land can have dangerous consequences. In *Cologne v. Westfarms Assocs.*, 469 A.2d 1201 (Conn. 1984), a shopping center was enjoined from barring a women's political advocacy group from circulating literature on its premises. *Id.* at 1204. A month later, the Ku Klux Klan appeared, demanding access to the mall for political expression. *Id.* at 1205. When the owners refused, more Klan members arrived, and a "heated demonstration" occurred at the mall, to which "[p]olice from several area towns and the state police" were summoned "to bring the situation under control. This demonstration resulted in the closing of some of the stores in the Mall for a portion or for the remainder of that day." *Id.* Recognizing that forbidding mall owners from exercising the right to exclude was leading to "a highly dangerous situation which the police would be unable to control," *id.*, the trial court dissolved the injunction, and the state supreme court found that the state constitution did not entitle individuals to speak on the private property of others. *Id.* at 1210.

Fourth, most state courts considering the issue have rejected the rationale of the California *PruneYard* decision on grounds that also undermine this Court's decision. *See Golden Gateway Ctr.*, 26 Cal. 4th 1013, 1021 n.5 (listing state decisions rejecting the *PruneYard* rationale); *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal. 4th 850, 874 (2007) (Chin, J., dissenting) (same). These courts found that forcing property owners to admit speakers would violate private property rights, constitute "significant governmental intrusion into private individuals' affairs and relations," and "deprive individuals of important rights of freedom." *Western Pennsylvania Socialist*

Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.3d 1331, 1335 (Pa. 1986).

In *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., L.P.*, 392 S.E.2d 8, 9 (Ga. 1990), the Georgia Supreme Court rejected the *PruneYard* rationale on the grounds that "under the federal constitution, the owner of a privately owned and operated shopping center may prohibit the distribution of handbills or petitions unrelated to the operations of the center." In *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 61-62 (Ohio 1994), the Ohio Supreme Court also rejected the *PruneYard* theory because "[t]he right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities with another's business . . . . The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." (citations omitted).

Depriving mall owners of the right to exclude is a particularly "serious form of invasion of [their] property interests." *Loretto*, 458 U.S. at 435. It is also characteristically distinct from the broad decrease in value that this Court has addressed through multifactor analyses. *PruneYard* slighted the importance of the right at issue, applied an inappropriate test, and confused the relevant questions. This case presents a fitting opportunity to correct an important area of takings law.

II

THIS COURT SHOULD GRANT CERTIORARI TO UPHOLD THE FIRST AMENDMENT RIGHTS OF SHOPPING MALL OWNERS

A. First Amendment Rights, Including the Right Not To Speak, Apply to Corporate Speech as Well as Individual Speech

Because corporations are groups of individuals who pool their rights and resources for common purposes, corporations are generally said to enjoy constitutional status as "persons." But this is only a convenient shorthand for the fact that owners and managers have constitutionally protected rights. *See The Railroad Tax Cases*, 13 F. 722, 747-48 (C.C.D. Cal. 1882) ("[C]ourts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in [the corporation's] name."). Thus, the individuals who comprise a corporation may exercise their freedom of speech by expressing themselves together, in the name of the corporation. Indeed, their doing so is often an important ingredient in public debate and discussion. *Pac. Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion) ("Corporations . . . contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.") (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Consolidated Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 544 (1980)). *See also* Martin H. Redish and Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free*

Expression, 66 Geo. Wash. L. Rev. 235, 236 (1998) ("Who . . . has a greater interest in what actions the government takes with regard to the economy than corporations, whose very survival may well turn on the success or failure of those actions?").

Individual First Amendment rights include the right not to speak, and not to be forced to endorse messages with which one disagrees. *See, e.g., Wooley*, 430 U.S. at 714 (freedom of thought and expression "includes both the right to speak freely and the right to refrain from speaking at all"). The First Amendment protects both a person's freedom to express her views and a "concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985).

Because individuals enjoy this right to refrain from speaking, the corporations they form also enjoy this right. For example, a newspaper cannot be required to respond to candidates' arguments when it might prefer to be silent. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). And a private utility company cannot be forced to distribute a newsletter published by a third party. *Pac. Gas & Elec. Co.*, 475 U.S. at 9.

This Court appeared to set these concerns aside when it decided, in *PruneYard*, 447 U.S. at 76-77, 81, that the California Supreme Court's expansive reading of that state's free expression guarantee was consistent with the mall owner's federal constitutional rights. This Court decided that forcing property owners to provide a forum for speech with which they might disagree did not violate the owner's First Amendment rights, for three reasons: First, the shopping center was

open to the public, making it unlikely that the opinions of trespassing speakers would be attributed to the owners. *Id.* at 87. Second, the state did not require that any specific message be displayed and this content-neutrality ensured that the government would not discriminate for or against any message. Third, owners could engage in their own speech to disclaim support of the petition circulators' message. *Id.* at 87-88.

PruneYard is not reconcilable with other First Amendment cases involving the right not to speak, and for the most part, the Court has skirted the conflicts between these cases. In *Pacific Gas and Electric Co.*, which struck down a state's requirement that private companies distribute the messages of third parties, this Court distinguished *PruneYard* on the grounds that "the owner [in *PruneYard*] did not even allege that he objected to the content of the pamphlets; nor was the access right content based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible." 475 U.S. at 12. Subsequent cases therefore focused on whether the property owner objects to the message being distributed. *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579-80 (1995) (noting that, because the mall owner in *PruneYard* never alleged offense, the distribution of pamphlets did not threaten the owners' autonomy).

These cases illustrate the tension between two, often competing, conceptions of the freedom of speech: one views expressive rights as centered around individual autonomy, and the other views it as a component of democratic government. Where concerns of individual autonomy are paramount, negative speech rights hold sway; but where the "marketplace of ideas"

is the primary interest, courts are inclined to hold that the solution to unwanted speech is more speech. This Court's protection of individual autonomy explains the results in such cases as *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943) (invalidating a state law requiring elementary school students to salute the American flag, because the "principles [embodied in the Bill of Rights] grew in soil which also produced a philosophy that the individual was the center of society"); *Abood*, 431 U.S. at 234-35 (allowing agency shop fee payers to disassociate from union speech with which they disagreed); *Hurley*, 515 U.S. at 575 ("[W]hatever the reason [to disagree with a certain point of view], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."), and *Pac. Gas and Elec. Co.*, 475 U.S. at 11 (refusing to allow a state agency to dictate the contents of a private utility's billing envelope).

PruneYard stands as an aberration in the context of these decisions, because it employed the marketplace of ideas theory in what was literally a *private* marketplace. 447 U.S. at 87-89. The Court has shown particular consideration to property owners whose property would be converted to use by other speakers when the property owner can be expected to oppose the message that the intruders seek to convey. *Pac. Gas and Elec. Co.*, 475 U.S. at 15-16 (quoting *PruneYard*, 447 U.S. at 100) ("'This pressure to respond 'is particularly apparent when the owner has taken a position opposed to the view being expressed on his property.' "). After all, the right to refrain from speaking rings "hollow if a landowner must make his property a platform for expression he finds offensive." Gregory C. Sisk, *Returning to the PruneYard: The*

Unconstitutionality of State-Sanctioned Trespass in the Name of Speech, 32 Harv. J. L. & Pub. Pol'y 389, 397 (2009).

By asserting in this case that the union may protest on Macerich's privately owned shopping center properties, the decision below conflicts with one of this Court's most fundamental doctrines—that *state action* is required in order for constitutional protections to be triggered. "[T]he guarantees of free speech . . . guard only against encroachment by the government and 'erec[t] no shield against merely private conduct.' " *Hurley*, 515 U.S. at 566 (citation omitted). The Constitution provides "a guarantee only against abridgment [of the right of free speech] by *government*, federal or state." *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 513 (1976) (emphasis added). As Justice Powell presciently observed in *PruneYard*, "state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." 447 U.S. at 97 (Powell, J., concurring). Those questions are explicitly presented in this case and warrant resolution by this Court.

B. A Government Mandate That Private Property Owners Endure Offensive, Provocative Speech on Their Premises Violates the First Amendment

Government compulsion of property owners to permit speech on their property creates a "pressure to respond." *Pac. Gas and Elec. Co.*, 475 U.S. at 15-16. This pressure occurs regardless of whether or not the speaker agrees with the speech and occurs at the time the government compels the owner to host the

unwarranted speech. *See* Anna M. Taruschio, Note, *The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes*, 27 Fordham Urb. L.J. 1001, 1039 (2000). Thus, while this Court sought to explain *PruneYard* in subsequent cases by reference to the fact that the mall owner in that case raised no objection to the content of the speech, this should have had no bearing on the First Amendment analysis. Rather, the analysis should have turned on the autonomy rights of the property owners.

In cases like *PruneYard*, that do not invoke the marketplace of ideas rationale, the Court should look no further than the right of the affected individual to speak or to remain silent. Particularly because this Court decides only very few of the cases that raise this issue, the constitutional rule announced should be one that can apply in the most common fact situation—where the owner *does* object to the speech he is commanded to host.

Shopping centers have a compelling need to protect their premises from speech that seeks to undermine their purpose for existence. Shopping centers must compete with big-box stores, warehouse club stores and e-retailing. Lee, Min-Young, *et al.*, *Competitive Analysis Between Regional Malls and Big-box Retailers: A Correspondence Analysis for Segmentation and Positioning*, 13 J. of Shopping Ctr. Research 81, 81-82 (2006). Requiring them to host speech activity imposes considerable costs on them, even beyond the risk that specifically anti-mall speech will succeed in encouraging boycotts. Shopping malls will be required "to assume the burdens of security for political protests, to allocate limited space to competing special interest groups, [and] to suffer potential liability if patrons are injured by

disruptive activists." Gregory C. Sisk, *Uprooting the Pruneyard*, 38 Rutgers L.J. 1145, 1191 (2007). Most of all, a shopping mall typically has reason to engage in only one type of speech: that which will encourage people to spend their money on the premises. Shopping mall managers encourage customers by advertising and promoting the mall's mix of shops and other services and entertainment. *Id.* at 94-95. Mall management must be silent on virtually every other topic to avoid alienating some portion of the customer base.

"Compared with the Court's liberal protection of newspapers, which exist to engage in expressive activity, it is unreasonable to burden shopping centers with an obligation to provide platforms for the dissemination of views with which the owners may disagree, when expressive activity represents no part of shopping centers' business functions." Frederick W. Schoepflin, Comment, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 Wash. L. Rev. 133, 144 (1989). This is true even when some owners may be indifferent to expressive activity unless it impairs the commercial viability of their shopping centers. Even when some owners do throw open their doors to speakers, the government cannot burden those who are more circumspect. Analogously, while some newspapers freely accept and print opposing views, the Court does not mandate an "equal time" policy for publications. *See Tornillo*, 418 U.S. 241.

Mall owners endure a very real pressure to respond to anti-mall speech on the premises. An effective corporate response must be made almost immediately to avert or minimize harm or simply to avoid being defined by one's opponents. When

unionized carpenters protested at Meadowbrook Mall in Bridgeport, West Virginia, last year, distributing handbills complaining about mall hiring practices, the mall responded in a press release that the "information contained in these handbills is scurrilous, inflammatory and flat-out wrong." The mall justified the actions of its general contractor and detailed the lengths to which the mall and the contractor went to appease the unions prior to the protest. Joe Bell, *Response to Misleading Union Protest at Meadowbrook Mall* (July 21, 2008).[2]

Companies—and even entire industries—often find it necessary to respond rapidly to attacks on their business practices. For example, the past few years have seen self-proclaimed health advocates excoriate certain restaurant chains for "supersizing" meal portions and thus "causing" obesity in their patrons. *See, e.g.*, Center for Science in the Public Interest, *Nutrition Action Health Letter* (containing a regular column attacking certain foods, such as Baskin-Robbins sundaes, as "food porn");[3] *Pelman ex rel. Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (S.D.N.Y. 2006) (blaming McDonald's for childhood obesity). In response to this growing trend, the National Restaurant Association created a "Rapid Response Program" specifically designed to "rebut denigrating and negative portrayals of the restaurant industry wherever they occur in the media, as well as to commend portrayals

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[2] *Available at* http://www.cafarocompany.com/Press/pdf/p65.pdf (visited Sept. 14, 2009).

[3] *Available at* http://cspinet.org/nah/index.htm (visited Sept. 15, 2009).

that accurately and positively describe the industry."[4] This type of response is growing more common, as businesses of all types seek to counter bad publicity with positive information. Robert D. Richards and Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. Rev. 553, 568. Such exchanges are normal and even laudable in the "uninhibited, robust . . . wide-open . . . vehement, caustic, and sometimes unpleasantly sharp" realm of free public debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Yet in California, where the malls in this case are located, businesses often may be unable to respond even if they want to. A business' ability to engage in counter-speech in California is particularly chilled given the California Supreme Court's decision in *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003). In that case, a national corporation sought to respond to public attacks on its business practices by publishing reports disputing the factual assertions on which those attacks were based. Despite the fact that such give-and-take is precisely what the First Amendment was designed to protect, activists sued the company under California's "unfair competition law," arguing that the speech was an unfair business practice. The company's defense—that its speech was protected First Amendment expression—was rejected by the California Supreme Court. Although this Court's grant of certiorari was dismissed for procedural reasons, Justice Breyer summed up the impact of the California Supreme Court's decision accurately: "The upshot is

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[4] *Available at* http://www.restaurant.org/pressroom/rrlist.cfm (visited Sept. 14, 2009).

that commercial speakers doing business in California may hesitate to issue significant communications relevant to public debate because they fear potential lawsuits and legal liability." 539 U.S. at 682 (Breyer, J., dissenting).

Shopping mall owners must not be made to serve up their private property to host the speech activities of others, particularly when those others have no purpose other than to cause economic harm to the mall itself. Mall owners are under tremendous pressure to respond to these attacks, contrary to their preference of remaining silent. This Court should grant certiorari to uphold the First Amendment rights of private shopping mall owners to forbid third-party speech on their property.

III

THE CRITERIA FOR OVERRULING *PRUNEYARD* HAVE BEEN MET

While *stare decisis* is an important legal principle that protects citizens' reliance interests, those interests cannot justify keeping a wrongly decided case on the books. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). *PruneYard* was incorrectly decided and should not remain binding precedent.

Stare decisis counsels against overruling a prior decision, but it consists of "a series of prudential and pragmatic considerations" to promote the rule of law and "gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992). Here, those prudential concerns are outweighed by the importance of straightening the precedent of property and free speech law. The *PruneYard* approach has

required repeated refinements and distinctions. In the realm of takings, this Court distinguished the case in *Loretto,* 458 U.S. at 435 n.12, holding that while the relatively tiny physical invasion in that case was a *per se* taking, the far more significant invasion in *PruneYard* was not, due to the fact that the latter was "temporary." Yet in *First English*, this Court observed that temporary invasions of property rights are nevertheless compensable takings. 482 U.S. at 318. First Amendment decisions have also distinguished *PruneYard.* In *Hurley*, 515 U.S. 557, the Court found that the operators of a private parade could not be forced to allow activists to march in the parade, and distinguished *PruneYard* on the grounds that the parade's operators were likely to be seen as endorsing the trespassers' message, while the mall owners would not have been. *See id.* at 580. Yet this "attribution" distinction did not operate at all in *Wooley,* 430 U.S. 705, where there was no suggestion that anyone would attribute the state's message of "live free or die" to the plaintiff.

In *Pacific Gas and Electric Co.*, this Court employed a different distinction, finding that the utility company owners disagreed with the opinions expressed in the pamphlets they were forced to distribute, while the owners of the PruneYard shopping center had not disagreed with the message expressed by the trespassers. But disagreement was not found to be essential in *Tornillo*, 418 U.S. at 258, where the First Amendment barred the government from requiring newspapers to provide space for others' expression, even though there was no suggestion that readers would assume the newspaper agreed with the message.

The unworkability of *PruneYard* is also indicated by the fact that other states have avoided its impracticable results by holding that their state constitutions do not require shopping centers to admit speakers and solicitors. *See, e.g., Cologne,* 469 A.2d 1201; *Western Pennsylvania Socialist Workers 1982 Campaign,* 515 A.3d 1331; *Citizens for Ethical Government, Inc.,* 392 S.E.2d 8; *Slanco,* 626 N.E.2d 59. These decisions have been based on state courts' recognition that the *PruneYard* approach violates property owners' interconnected rights of exclusion and expression. Thus the *PruneYard* rule has not led to the kind of reliance concerns that should be avoided by maintaining that rule—on the contrary, even California courts have narrowed the case's applicability. *See Golden Gateway,* 26 Cal. 4th 1013; *Albertson's, Inc. v. Young,* 107 Cal. App. 4th 106, 109-10 (2003).

The *PruneYard* decision—allowing the government to force property owners to allow persons on their land to express political opinions when the owners would prefer not to speak and not to subsidize that speech—is inconsistent with basic principles of free expression and private property. This case is an appropriate opportunity to reconsider the decision and overrule it.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

DATED: September, 2009.

Respectfully submitted,

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No. 09-235

Supreme Court, U.S.
SEP 25 2009
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In The
Supreme Court of the United States

MACERICH MANAGEMENT COMPANY AND MACERICH PROPERTY MANAGEMENT COMPANY,

PETITIONERS,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 586; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 505; AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR DONAHUE SCHRIBER, FOREST CITY ENTERPRISES, INC., GENERAL GROWTH PROPERTIES, INC., SIMON PROPERTY GROUP, INC., THE TAUBMAN REALTY GROUP LIMITED PARTNERSHIP, AND WESTFIELD, LLC AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici own and operate shopping malls throughout the country. Each has had experiences where speakers have demanded physical access to its malls to spread their messages, some of which directly relate to the mall or its retailers. Amici's experience is that such speakers distract shoppers from the message promoted by the mall—to purchase the goods and services offered by the mall's tenants. The presence of these speakers by authority of law thus alters the ambience and shopping experience that a mall can guarantee its tenants, and costs both the mall and its tenants money.

Donahue Schriber, a privately held REIT, owns and/or operates 93 neighborhood, community, community lifestyle and power shopping centers. The company's 150 employees presently manage a portfolio totaling over 16 million square feet located throughout California, Arizona and Nevada. With more than 40 years of experience in retail property ownership and

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[1] The parties' counsel of record received timely notice of the intention to file this brief. Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

development, Donahue Schriber is made up of a highly skilled team of professionals who have consistently been recognized for their expertise in the development, asset management, leasing, and marketing of all retail property formats. Its vision is to create environments of excellence for its customers, tenants, and communities by developing and operating shopping centers recognized for their quality and value.

Forest City Enterprises, Inc. is an $11.7-billion NYSE-listed national real estate company. Forest City is principally engaged in the ownership, development, management, and acquisition of commercial and residential real estate and land throughout the United States. With more than 80 years of experience in property ownership and development, Forest City through its subsidiaries has ownership interest in and/or management responsibility for 52 shopping centers located throughout the United States. As of January 2009, Forest City's retail portfolio totals 27 million square feet of retail space. Forest City has been recognized for its expertise in maintaining a well balanced property portfolio and a team of highly skilled and creative real estate professionals.

General Growth Properties, Inc. owns, develops, operates, and/or manages more than 200 regional shopping malls in 44 states. In California alone, GGP has ownership interests in and/or management responsibility for twenty shopping mall properties located throughout the State. On April 16, 2009, GGP and approximately 166 of its shopping centers and other subsidiaries voluntarily sought

relief under chapter 11 of the United States Bankruptcy Code, and GGP presently operates as a debtor in possession.

Simon Property Group, Inc. is an S&P 500 company and the largest public U.S. real estate company. Simon is a fully integrated real estate company which operates from multiple platforms, including regional and super regional malls, premium outlet centers, and community/lifestyle centers. Simon owns or has an interest in 325 properties in 41 states in the United States, comprising over 245 million square feet of gross leaseable area. In California, Simon owns or has an interest in over 20 shopping centers.

The Taubman Realty Group Limited Partnership, through its affiliates, is engaged in the ownership, development and management of regional and super regional shopping centers. Taubman's 24 U.S. owned and/or managed properties, the most productive in the industry, serve major markets from coast to coast including two in California. Taubman is headquartered in Bloomfield Hills, Michigan and its Taubman Asia subsidiary is headquartered in Hong Kong.

Westfield, LLC and its affiliates currently own interests in 24 shopping centers located in California and 31 shopping centers across 10 other States, all of which are managed by Westfield. Westfield's portfolio in the United States includes approximately 63.2

million square feet of gross leasable area and contains approximately 8,843 retailers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal constitutional right to freedom of speech does not limit the rights of private shopping mall owners to regulate speech on their property. *See Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976) (overruling *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968)).

For close to three decades, however, this Court has permitted state courts to commandeer private shopping malls to provide free space for expressive conduct, including picketing, leafleting, canvassing, and petitioning. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In *PruneYard*, the Court held that a state requirement that a private shopping mall permit access by third parties to the mall's property to express themselves was not a violation of the Fifth Amendment's Takings Clause or the First Amendment's Free Speech Clause. State courts, relying on *PruneYard*, have experimented with ever more onerous and expansive burdens on shopping mall owners to subsidize and host expressive conduct on their private property, including expression of views with which the property owners do not agree, and even ones intended to stop listeners from doing business at that shopping mall. Those experiments have been a failure, and this Court should end them.

This Court's intervening decisions under both the Takings Clause and the First Amendment have turned their back on *PruneYard*, repeatedly distinguishing it, and have ultimately left it without doctrinal support. Only this Court, however, can administer the last rites to this anachronistic decision. Review should be granted to overrule *PruneYard*.

A. As evidenced by this case, and nearly thirty years of experience, state case law requiring access to shopping mall owner's property has often been used by speakers as a forum to urge people not to purchase goods and services from the mall and its tenants. Regardless of whether speech targets a specific store within the shopping mall, requiring malls to host speakers imposes substantial burdens on scarce mall resources and commandeers mall owners to serve as legislator, licensing board, and police for a forum for third-party speakers that they never intended to create.

The detrimental economic effect on mall owners and their tenants significantly undercuts *PruneYard*'s suggestion that forcing owners to give speakers a forum will not unreasonably impair the value or use of property as a shopping mall.

Further, the blossoming of the Internet has made alternative methods of communication available to speakers. Thus, any concern about reduction in the

availability of fora for individuals to express their views to others has been superseded by technological innovation and does not require the impressment of private shopping malls.

B. Since this Court decided *PruneYard* in 1980, this Court's Takings Clause and Free Speech Clause jurisprudence has developed in ways that demonstrate that *PruneYard*'s conclusion is inconsistent with basic precepts of constitutional law.

With regard to the Takings Clause, this Court has clarified that physical invasions of real property are *not* subject to the multi-factor balancing test used in *PruneYard*, but are per se violations of the Takings Clause.

With regard to the Free Speech Clause, this Court has clarified, in cases involving compelled speech and compelled subsidization of private speech, that the First Amendment is violated if someone subjected to government regulation may be forced to respond to speech that the government foists upon him, or if someone is required to subsidize the private speech of another person unless that requirement furthers some broader regulatory program that requires collective action.

C. At the very least, this Court should grant review and confine *PruneYard* to its facts. The Court should hold that the Constitution bars a State from compelling a private shopping mall to allow expressive conduct on its property, when the property owner objects because the expression—such as that

here, which urged patrons to boycott the mall and its stores—supports a cause opposed by the mall and conflicts with the mall's commercial interests.

ARGUMENT

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), should be overruled. Overruling this constitutional opinion is appropriate because in the 29 years since *PruneYard* the "factual assumptions" of the decision have been disproved and subsequent case law has "undermined" *PruneYard*'s "basic legal principles." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion).

A. Contrary To The Factual Assumptions Underlying *PruneYard*, Forcing Property Owners To Host Speakers On Their Property Diminishes Property Values And Imposes Substantial Burdens

As the Court acknowledged in *PruneYard*, the purpose of a shopping mall is to provide retailers with an environment that encourages consumers to purchase their goods and services. In *PruneYard*, the Court justified its holding that compelling owners of shopping malls to permit speakers on their property would not interfere with the mall's commercial functions because shopping malls could adopt reasonable "time, place, and manner regulations." 447 U.S. at 83.

As evidenced by this case, and almost thirty years of experience, however, that is not how access for speakers has worked in practice. The detrimental economic effect on mall owners and their tenants significantly undercuts *PruneYard*'s suggestion that forcing owners to give speakers a forum will not "unreasonably impair the value or use of [the owners'] property as a shopping center." *Ibid.*

1. Compelling shopping malls to host third-party speakers undermines the shopping mall as a commercial enterprise

Notwithstanding that the purpose of shopping mall property is to encourage commercial transactions, state courts (and federal courts interpreting state common law) have relied on *PruneYard* to compel shopping malls to host speech that is inimical to this purpose.

As in this case, courts have compelled shopping malls to host speakers that explicitly discourage purchases from retailers within the shopping mall, despite efforts of the malls to exclude such speech. For example, in *Fashion Valley Mall, LLC v. National Labor Relations Board*, 172 P.3d 742 (Cal. 2007), *cert. denied*, 129 S. Ct. 94 (2008), a sharply-divided California Supreme Court held that speakers had "the right to urge customers in a shopping mall to boycott one of the stores in the mall" despite a mall regulation to the contrary. *Id.* at 743. (The dissenters, by

contrast, would have overruled *PruneYard* entirely.); *see also Glendale Assocs. v. National Labor Relations Bd.*, 347 F.3d 1145 (9th Cir. 2003).

An illustration outside the labor context is mall owners' recent experiences in California dealing with animal rights groups that are opposed to the sale of puppies from so-called "puppy mills." Their members protest inside malls that have pet store owners as tenants. Their intent is to dissuade shoppers from patronizing the malls' pet store tenants and ultimately cause the closure of those stores. Their website lauds the success of earlier mall protests that resulted in the closure of pet stores at another Southern California mall, and identifies multiple malls where protests are on-going or planned.[2]

Lack of control over the shopping mall's environment impairs the ability of the mall's owner to

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[2] "Since holding the first peaceful demonstration back in December 2007, a number of pet stores selling mill puppies have closed their doors, including two Posh Puppies stores, Pets of Bel Air and Pet Love in the Beverly Center. Puppies and Babies, owned by the same person who owned Pets of Bel Air, also closed down. * * * The work continues. Peaceful demonstrations are now being held in areas near Just Paws at the Glendale Galleria, Pet World at the Northridge Fashion Center and Puppy and Me in Sherman Oaks, and near the Barkworks stores at the Mission Viejo Mall, Westside Pavilion and the Brea Mall. Demonstration applications are pending at two other malls that house Barkworks stores." Sandy Miller, Best Friends Animal Society, *The Power of Information*, July 31, 2009, http://network.bestfriends.org/campaigns/puppymills/news.aspx?pID=11897.

meet its obligations to its lessees to create an environment to encourage consumers to purchase goods. Under their lease agreements, the mall owners are obligated to protect tenants in the quiet enjoyment of their premises. Tenants could also contend that mall owners should not permit the distribution of defamatory materials on their property. But how can owners fulfill these obligations when they are forced to allow speakers whose avowed purpose is to put certain tenants out of business and, according to the court below, cannot prescreen the materials? Potential litigation from speakers and tenants is a burden that, under *PruneYard*, mall owners face on a daily basis.

The ability of the property owner to create a particular ambiance that attracts consumers and encourages those consumers to make purchases is essential to the shopping mall's economic livelihood. Even when the speech does not target a specific store within a shopping mall, third parties speaking in the mall results in decreased commercial activity and generally detracts from the shopping mall's ability to serve its purpose.

For example, in *Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987), a dance troupe sought permission to "perform a choreographed depiction of the results of nuclear warfare as a political statement." *Id.* at 834. The day the troupe performed and handed out leaflets to mall patrons, "several stores within the mall suffered identifiable reductions in sales." *Id.* at 835; *see also Lam v. Ngo*, 111 Cal. Rptr. 2d 582, 586-587

(Cal. Ct. App. 2001) (demonstrators in restaurant parking lot challenging restaurant owner's political views caused the restaurant to suffer a 40 percent decline in revenues).

Customers may blame the mall, rather than state law, for the intrusion they experience and thus decrease their visits to that mall. *See Costco Companies, Inc. v. Gallant*, 117 Cal. Rptr. 2d 344, 352 (Cal. Ct. App. 2002) (noting that Costco had received complaints from customers because of the speakers' presence). Amici have all received numerous calls from customers who are livid that the mall would allow certain speakers to use the mall property. Some of these irate customers leave contact information, permitting the mall to explain that they do not select the speakers, but many of these customers do not leave contact information, and thus constitute lost customers.

To be sure, the courts in *Jacobs*, *Lam,* and *Costco Companies* (as in some of the other cases cited in this brief) ultimately upheld the owners' right to exclude the speakers from their property. The cases nevertheless demonstrate the economic effect of *PruneYard*'s legacy, for two reasons. First, in some jurisdictions the speakers' conduct will be protected and similar burdens will be borne by property owners in those States. Second, even in situations where no state court ultimately would hold that property owners are required to host such speakers on their property, until the issue is finally resolved, the property owners are forced to endure significant

burdens based on the speakers' assertion that they have the right to speak on the owners' private property.

2. *Compelling shopping malls to host third-party speakers requires property owners to subsidize private speech*

Requiring shopping mall owners to provide access to speakers has imposed continuing burdens on scarce resources. For many shopping malls, parking is in particularly short supply, and speakers can consume that resource. In *Slauson Partnership v. Ochoa*, 5 Cal. Rptr. 3d 668 (Cal. Ct. App. 2003), a retail tenant (other than the one being targeted by the protestors) asked the property owner for a rent abatement because the protestors were occupying numerous parking spaces in the complex, making it more difficult for its customers to use the mall. *Id.* at 676.

Requiring shopping malls to host speakers imposes substantial burdens on malls, commandeering them to serve as legislator, licensing board, and police force for a forum for third-party speakers that they never intended to create.

"Time, place, and manner regulations do not grow on trees." Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of* PruneYard v. Robins, 64 U. CHI. L. REV. 21, 48 (1997). Property owners must bear the significant expense of formulating and enforcing regulations, which often will

involve consultation with attorneys, tenants, and local authorities.

Once the shopping mall has established the rules, it must still allocate limited space to competing special interest groups, which can cause additional administrative burdens. In *Costco Companies,* "on a regular basis" organizations conducted "fax wars" wherein they would "apply to every location in a particular area and block" out all other organizations. 117 Cal. Rptr. 2d at 352-353. It is also a frequent occurrence that property owners must repeatedly inform speakers that they are not permitted to speak on the property because the speakers are not abiding by established rules. *See, e.g., Glendale Assocs.*, 347 F.3d at 1149-1150; *Jacobs*, 407 N.W.2d at 498-500.

Moreover, because organizations that seek to use the mall owners' property are often composed of highly ideological members, there is sometimes a risk of violence when one organization believes it is being treated unfairly by the mall owner. In *Cologne v. Westfarms Associates*, 469 A.2d 1201, 1205 (Conn. 1984), for example, once the trial court ordered the property owner to grant the National Organization for Women access to its mall for advocacy work, a variety of other groups, including the Ku Klux Klan, sought access to the mall. Though these requests were denied, members of the Klan appeared at the mall and clashed with anti-Klan demonstrators. *Ibid.* To quell the "heated demonstration," the property owners had to rely on state and local police as well as police from surrounding towns, and even then some of

the stores in the mall had to close for the remainder of the day. *Ibid.* Other courts have likewise recognized the "substantial problem" faced by property owners due to "altercations between the proponents and opponents of particular petition gathering efforts" who are fighting over the right to use a particular location. *Costco Companies,* 117 Cal. Rptr. 2d at 353.

In addition, property owners and their tenants must sometimes hire additional security guards to protect both their employees and their customers from the speakers. In *Costco Companies*, employees of the store were "verbally and physically abused by petition gatherers." 117 Cal. Rptr. 2d at 352. Likewise speakers outside the restaurant in *Lam* "physically accosted prospective patrons." 111 Cal. Rptr. 2d at 587. Speakers can also cause property damage both to target stores and to property of the consumers patronizing those establishments. *See, e.g., ibid*; *Slauson P'ship*, 5 Cal. Rptr. 3d at 673-674.

The need for private security is enhanced because of confusion about the extent of speakers' rights in shopping malls under state case law like that sanctioned in *PruneYard*. As a result, police may refuse to enforce generally applicable laws governing trespass and noise restrictions. In various instances, local authorities have refused to arrest or interfere with speakers based on the authorities' understanding that the speakers had the right to be present, even when courts later disagreed. *See, e.g., Cologne*, 469

A.2d at 1205 n.4; *see also National Labor Relations Bd. v. Calkins*, 187 F.3d 1080, 1084 (9th Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). For example, union organizers in hospitals falsely, though sometimes successfully, claim immunity from trespass laws based on the rights bestowed to them under *PruneYard* and its progeny. *See* William J. Emanuel, *Union Trespassers Roam The Corridors Of California Hospitals: Is A Return To The Rule Of Law Possible?*, 30 WHITTIER L. REV. 723, 724 (2009).

These cases reflect the on-the-ground reality faced by amici in their shopping malls on a regular basis. Almost thirty years of litigation and practice have not established a workable system. To the contrary, the shopping malls are regularly forced to host speakers that injure their profits and reputation, and have obtained little certainty from courts regarding any limits that can be imposed on speakers. The experiment of *PruneYard* has borne only bitter fruit.

B. *PruneYard* Should Be Overruled Because Subsequent Cases Have Undermined Its Doctrinal Foundations

Since this Court decided *PruneYard* in 1980, this Court's Takings Clause and Free Speech Clause jurisprudence have developed in ways that show the inconsistency of *PruneYard*'s conclusion with basic

precepts of constitutional law. Indeed, *PruneYard* has been discussed by this Court in only four majority opinions involving the Takings Clause and three majority opinions involving the First Amendment and in virtually every instance, *PruneYard* has been distinguished and narrowed. It is time to bury *PruneYard* once and for all.

1. PruneYard's holding that compelling a mall owner to permit people to enter its property to engage in expressive conduct does not constitute an unconstitutional taking of property has been undermined by this Court's confirmation that the deprivation of the right to exclude constitutes a per se taking

a. In *PruneYard*, the Court held that a state requirement that a private shopping mall permit third parties to come onto and use its property to express themselves was not a violation of the Takings Clause.

The Court acknowledged that "there has literally been a 'taking'" of "the right to exclude others." 447 U.S. at 82. But the Court held that it was appropriate to apply a multi-factor test that examined "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* at 83. With regard to the latter two factors, the Court concluded on the record before it that there was "nothing to suggest that preventing [the shopping mall owners]

from prohibiting this sort of [expressive] activity will unreasonably impair the value or use of their property as a shopping mall." *Ibid.* The character of the governmental action, forcing the shopping mall to allow speakers to "'physically invade[]' appellants' property," was held not to be "determinative" in light of the other factors. *Id.* at 84.

b. After *PruneYard*, however, this Court has clarified in several cases that physical invasions of real property are *not* subject to a multi-factor balancing test, but are instead per se violations of the Takings Clause. "The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

This per se rule first became clear only after *PruneYard*, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Loretto* held there was a per se taking when the government required a property owner to permit installation of cable television equipment on the roof of a private building. Even though the cable occupied at most only 1 ½ cubic feet of the property and even though the equipment would enhance the value of the building, the Court concluded that physical invasion "is a government action of such a unique character that it

is a taking without regard to other factors." *Id.* at 432.

Adhering to *Loretto*, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that imposing an easement so that the public could travel on the landowner's property was a per se taking. And in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court held that imposing a "recreational easement" so that people could hike next to the landowner's commercial property was a per se taking.

In each of those cases, the Court has sought to limit the seemingly contrary holding of *PruneYard*, albeit with little success.[3]

c. One tack for limiting *PruneYard* has been to describe the invasion in that case as "temporary," as opposed to "permanent." Thus, in *Loretto*, the Court distinguished *PruneYard* on the ground that the physical invasion by the speaker was "temporary and limited in nature," 458 U.S. at 434, even while noting that "the distinction between a permanent physical occupation and a temporary invasion will not always

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[3] Although the Court has cited *PruneYard* in four other Takings Clause cases, it did so in the context of merely describing the multi-factor takings test, not in relying on the application of that test in *PruneYard*. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *United States v. Security Indus. Bank*, 459 U.S. 70, 75, 78 (1982).

be clear," *id.* at 435 n.12. And in *Nollan*, the Court distinguished *PruneYard* on the ground that "permanent access was not required." 483 U.S. at 832 n.1.

But that distinction simply cannot explain the different outcomes. In *Loretto* itself, the Court explained that a physical invasion was to be treated as permanent even if the invasion might subside at the option of the third party whose equipment the private property owner was being required to host. The Court held that the physical invasion was "permanent," even though the cable equipment would remain only "[s]o long as the property remains residential *and a CATV company wishes to retain the installation*." 458 U.S. at 439 (emphasis added).

Even if that distinction was colorable at the time, it was undermined by *Nollan*. The Court in that case held that the easement was "permanent" "even though no particular individual is permitted to station himself permanently upon the premises" because "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." 483 U.S. at 832. "*Nollan*'s language substantially expands the definition of a permanent physical occupation." Alan E. Brownstein & Stephen M. Hankins, *Pruning* Pruneyard*: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1161 (1991).

Under *Nollan*'s holding, the access to the shopping malls in *PruneYard* cases is permanent because it does not expire. The owner will never have the right to deny speakers access. At many malls, there is often someone occupying the space designated for private speakers. Such a series of legally-sanctioned temporary invasions constitutes a permanent invasion. The mall's ability to close its door at night and (at least in theory) regulate the speakers' disruptive behavior hardly makes the obligation to provide access to speakers when it is open any less temporary. The holding in *Nollan*, concerning an easement on private property for the public to travel to the beach, "surely would not have turned the other way had the government restricted the easement to daytime use, limited the noise produced, or capped the number of public users at any one time." Gregory C. Sisk, *Returning to the* PruneYard*: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 410 (2009).

d. Another distinction relied on by the Court in *Loretto* and *Nollan* was that the shopping mall owner was already willing to allow people to enter the property if they wanted to shop. *See Loretto*, 458 U.S. at 434 ("the owner had not exhibited an interest in excluding all persons from his property"); *Nollan*, 483 U.S. at 832 n.1 ("the owner had already opened his property to the general public"); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 531 (1992) (relying on *PruneYard* for the proposition that because the

property owners "voluntarily open their property to occupation by others, [they] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.").

But persons invited to be on property for a limited purpose do not possess the right to engage in conduct that exceeds the scope of their invitation. That a diner is open to the public twenty-four hours a day for serving food does not give the public a right to sleep in its booths. The invitation to the public "is to come to the [shopping mall] to do business with the tenants. * * * There is no open-ended invitation to the public to use the [mall] for any and all purposes" that the public might desire. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 564-565 (1972).

Further, even if tenable at the time, that distinction of *Loretto* and *Nolan* has not survived the Court's subsequent decision in *Dolan*. In *Dolan*, this Court held that requiring an easement for the public to travel next to the property owner's commercial building was a per se taking. This was so, the Court reasoned, even though the owner "want[ed] to build a bigger store to attract members of the public to her property," because she "would lose all rights to regulate the time in which the public entered onto the [property]." *Dolan*, 512 U.S. at 394. In *PruneYard* cases, likewise, a property owner effectively loses all rights to exclude the non-shoppers from the property when the mall is open to the public.

2. *PruneYard's holding that a private property owner has no First Amendment right not to be forced by the States to use his property as a forum for the speech of others has been undermined by this Court's subsequent decisions prohibiting compelled speech and compelled subsidization of private speech*

a. *PruneYard* also rejected the claim that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." 447 U.S. at 85. The Court reasoned that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition * * * will not likely be identified with those of the owner" and that the owner could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id.* at 87.

Developments in two strands of First Amendment law—concerning compelled speech and compelled subsidization of private speech—demonstrate that *PruneYard* incorrectly applied core First Amendment principles.

b. Since *PruneYard*, this Court has clarified that the First Amendment is violated if someone subject to government regulation may be forced to speak to respond to speech that the government foists upon him. In "a number of instances," this Court has "limited the government's ability to force one speaker to host or accommodate another speaker's message."

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 63 (2006).[4]

In *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 475 U.S. 1 (1986), the Court invalidated compelled access to the envelope of a private utility's bill and newsletter. A plurality of the Court reasoned that the compelled access violated the First Amendment because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." *Id.* at 15 (plurality opinion). A disclaimer was not sufficient because a disclaimer "serves only to avoid giving readers the mistaken impression that [the] words are really those" of a third party and "does nothing to reduce the risk that [the property owner] will be forced to respond when there is strong disagreement with the substance of [the third-party's] message." *Id.* at 15 n.11. "That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to

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[4] Although this Court in *Rumsfeld* cited *PruneYard* with approval, the statute at issue in that case involved a situation where the property owner already had created a forum for speech, and federal law imposed a non-discrimination requirement to assure that the federal government (in particular, the military) was not excluded from the forum. 547 U.S. at 64. It did not address the predicate question, involved in this case, about the First Amendment limitations of requiring a private property owner to create a forum for speech of third parties in the first instance.

speak includes within it the choice of what not to say." *Id.* at 16 (citations and footnote omitted).

The plurality distinguished *PruneYard* as a case in which there was no allegation "that access to this area might affect the shopping center owner's exercise of his own right to speak." *Id.* at 12. Then-Justice Rehnquist, writing for the dissenters, by contrast, stated that he "believe[d] that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard*." *Id.* at 26.

Subsequently, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Court held that a state could not compel a private organization to include a group in its parade. The Court embraced the plurality opinion in *Pacific Gas & Electric* as governing law. The Court distinguished *PruneYard* on the ground that "speaker's autonomy was simply not threatened in that case." *Id.* at 580. By "autonomy," the Court appears to have meant "the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 573 (quoting *Pacific Gas & Elec.*, 475 U.S. at 16 (plurality opinion)).[5]

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[5] In addition to the cases cited in the section of the text, the Court has cited *PruneYard* in First Amendment cases for the proposition that a state "enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). The Court cited *PruneYard* with a "Cf." signal for the proposition that a challenged statute did not "require [businesses] to be publicly

(Continued on following page)

But again, the empirical tenet that was the basis for *PruneYard*, and was the basis for its distinction in *Pacific Gas & Electric* and *Hurley*, was wrong at the time and is currently untrue. Shopping mall owners are compelled to counteract the message of speakers and assure customers that they do not agree with their views. *See, e.g.*, *Calkins*, 187 F.3d at 1084 (explaining that, to respond to the presence of union picketers, store employees stood at the front of the store and distributed handbills explaining that they were not on strike).

c. Another strand of First Amendment protection, not addressed in *PruneYard*, is the protection against compelled subsidization of private speech. This Court has held that the First Amendment prohibits the government from compelling a person to subsidize the private speech of an organization unless in furtherance of some broader regulatory program that requires the existence of the organization (such as a labor union or bar association) to overcome a collective action problem. *See United States v. United Foods, Inc.*, 533 U.S. 405, 415-416 (2001) (collecting cases).

As a result of *PruneYard*, mall owners are compelled to subsidize the private speech of individuals and organizations who use owners' property free of charge rather than renting it at market rates. But

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identified or associated with another's message." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997).

this compelled subsidy is not linked to any collective action problem (indeed, the mall and the speakers are generally strangers to one another). The subsidy requirement is a stand-alone program unlinked to anything but a purported state interest in furthering speech on private property. But this Court observed in *United Foods* that it has not "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415.

C. At A Minimum, *PruneYard* Should Be Limited To Its Peculiar Facts

As petitioners explain (Pet. 21-24, 33-38), unlike the situation addressed in *PruneYard*, this case involves the much more common situation in which the property owner *does* object to the message being presented. 447 U.S. at 101 (Powell, J., concurring in part and concurring in judgment).

At a minimum, then, this Court should grant *certiorari* to confine *PruneYard* to its precise facts. The Court should hold that the Constitution bars a State from compelling a private shopping mall to permit expressive conduct on its property when the property owner objects because the expression—like that here, which urged patrons to boycott the mall and its stores—supports a cause that is opposed by the shopping mall owner and that conflicts with the mall's commercial interests.

CONCLUSION

For the foregoing reasons and those in the petition for a writ of certiorari, the petition should be granted.

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